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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1151.

JOHN C. DEPUTRON, PLAINTIFF IN ERROR,

vs.

ROWENA YOUNG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED MAY 20, 1889.

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1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, at the term of November, A. D. 1888.

Be it remembered that on the 14th day of June, 1884, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the U. S. Circuit Court, United States of America, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant.

Petition.

Now comes the said plaintiff and, complaining of the said defendant, says—

That the said plaintiff is a citizen and resident of the State of Ohio, and that the said defendant is a citizen and resident of the State of Nebraska, and that the matter or amount in dispute exceeds the sum or value of five hundred dollars, exclusive of costs.

That the said plaintiff is the owner in fee of the following-described property and entitled to the immediate possession thereof, to wit: The west half of the northeast quarter of the southwest quarter of section twenty-four (24), township ten (10), range six (6) east, of the sixth principal meridian, in Lancaster county and State of Nebraska, and entitled to the immediate possession thereof. Yet the said defendant wrongfully keeps plaintiff out of the possession thereof.

Whereupon the said plaintiff prays judgment against the said defendant for the possession of said property and her costs.

FRANK P. IRELAND,
2 THURSTON & HALL, *For Pl'ff.*

STATE OF NEBRASKA, } *ss:*
Douglas County, }

R. S. Hall, being duly sworn, says he is one of pl'ff's att'ys in above case; that he has read the foregoing petition and knows the contents, and the facts stated therein are true, as he verily believes; that said pl'ff is absent from and a non-resident of the State of Nebraska, and for that reason affiant makes this affidavit.

R. S. HALL.

Subscribed in my presence and sworn to before me this 14th day of June, 1884.

[SEAL.] W. F. GURLEY,
Notary Public.

Upon the back of said petitions appear endorsements in words and figures following, to wit: No. 348, H. U. S. circuit c't, district of

Nebraska. Rowena Young *vs.* John C. Deputron. Petition. Filed Jun- 14, 1884. Elmer D. Frank, clerk. Frank P. Ireland, Thurston & Hall, pl'ff's att'ys.

Thereupon, afterwards, to wit, on the 14th day of July, 1884, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant.

Answer.

Comes now the defendant and, for answer to the petition herein filed, says:

First defense.

That said plaintiff ought not to have or maintain her said action against this defendant, because he says that this defendant
3 and those under whom he claims the said premises had, subsequent to the 6th day of June, 1871, and prior to the 1st day of September, A. D. 1879, acquired a complete and perfect title to said premises in said plaintiff's petition described under and by virtue of a tax deed duly and legally executed, issued, and delivered to the grantor of this defendant by the county treasurer of Lancaster county, Nebraska, under and in conformity to and in accordance with the provisions of an act of the Legislature of the State of Nebraska entitled An act to provide a system of revenue, approved February 15th, 1869, and acts amendatory thereof, which tax deed was duly and legally recorded in the county clerk's office of Lancaster county, Nebraska, on the 13th day of June, 1871, in Book "H" of Deeds, at pages 592 & 593, and that the said premises were then vacant and unoccupied lands, and that said premises have never at any time from said 13th day of June, A. D. 1871, nor has any part thereof been in the occupancy or possession of said plaintiff or any other person through whom she claims her pretended title thereto; but, on the contrary, this defendant and his grantors, for more than five years continuously subsequent to said 13th day of June, A. D. 1871, and next prior to said 1st day of September, A. D. 1879, have continuously and uninterruptedly had and held the open, notorious, exclusive, and actual possession of all said premises under said tax deed adversely to the said plaintiff and those under whom she claims said premises, and defendant is a *bona fide* purchaser of said premises and paid the full value therefor, the sum of $10,000, without any knowledge or notice of any defect or infirmity in said tax deed or the title thereby conveyed or in the proceedings leading thereto. Said tax deed and the record thereof is in words and figures following:

4 *Tax Deed.*

Whereas Nelson C. Brock did, on the 12th day of June, A. D. 1871, produce to the undersigned, John Cadman, treasurer of the county of Lancaster, in the State of Nebraska, two certificates of purchase in writing, bearing date of the 7th day of September, A. D. 1868, signed by M. Langdon, who, at the last-mentioned date, was treasurer of said county, from which it appears that Nelson C. Brock did, on the 7th day of September, A. D. 1868, purchase at public auction, at the treasurer's office, in said county, the tracts, parcels, or lots of land lastly in this indenture described, and which lots were sold to him for the sums of seven $\frac{62}{100}$ dollars and four $\frac{12}{100}$, respectively, being the amounts due on the following tracts or lots of land returned delinqnent for the non-payment of taxes, costs, and charges for the year 1867, to wit, the north $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section number 24, township 10, range 6, 80 acres, and the S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ section 24, township 12, range 6; and it appearing that the said Nelson C. Brock is the legal owner of said certificates of purchase and the time fixed by law for redeeming the land therein described having now expired, and the same not having been redeemed as provided by law, and the said Nelson C. Brock having demanded a deed for the tracts of land mentioned in said certificate and which was the least quantity of the tracts above described that would sell for the amount due thereon for taxes, costs, and charges, as above specified, and it appearing that said lands were legally liable for taxation and had been duly assessed and properly charged on the tax book or duplicate for the year 1867, and that said lands had been legally advertised for sale for taxes and were sold on the 7th day of September, 1868: Now, therefore, this indenture, made this 12th day of June, 1871, between
5 the State of Nebraska, by John Cadman, the treasurer of said county, of the first part, and the said Nelson C. Brock, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the premises and the sum of one dollar in hand paid, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever, the tracts or parcels of land mentioned in said certificates and described as follows, to wit: N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 24, town. 10, range 6, eighty acres, and the W. side of S. W. S. W. section 24, town. 10, range 6, 20 acres; to have and to hold said mentioned tracts or parcels of land, with the appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns forever, in as full and ample manner as the said treasurer of said county is empowered by law to sell the same.

In testimony whereof the said John Cadman, treasurer of said ounty of Lancaster, has hereunto set his hand and seal on the dayc and year aforesaid.

JOHN CADMAN, *Co. Trcas.* [SEAL.]

Attest: R. A. BAIN, *County Clerk.*
[CO. SEAL.] Stamp.

STATE OF NEBRASKA, } ss:
County of Lancaster, }

On this 12th day of June, 1871, before me, a notary public, duly commissioned and qualified, for and residing in said county, personally appeared John Cadman, county treasurer, and he acknowledged the above instrument to be his voluntary act and deed.

In witness whereof I have hereunto set my hand and notarial seal the day and year last above mentioned.

[SEAL.] D. G. HULL,
Notary Public.

6 Said tax deed was endorsed on the back as follows: "Tax deed. State of Nebraska to Nelson C. Brock. State of Nebraska, county of Lancaster, *ss.* Filed for record June 13th, 1871, at the hour of 10.20 a. m., and recorded in Book H of Deeds, at pages 592 & 593. R. A. Bain, Co. cl'k, by R. O. Philips, deputy. Ch'g'd, Brock, 1.

Second defense.

And this defendant, for a second and further defense, says that said plaintiff ought not to have or maintain her said action against him, because he says that the said supposed cause of action did not accrue to said plaintiff within ten years next before this action was begun, and that this defendant and those under whom he claims said premises have, for more than ten years next preceding the beginning of this action, continuously and uninterruptedly kept and held the open, notorious, and exclusive possession of said premises in the plaintiff's petition described adversely to said plaintiff and those under whom she claims said property.

Third defense.

And this defendant, further answering, denies that the said plaintiff is the owner of the premises described in her petition; and this defendant also denies that the plaintiff is entitled to the possession of the said premises, and prays to be hence dismissed with his costs, to be taxed.

LAMB, RICKETTS & WILSON.

THE STATE AND DISTRICT OF NEBRASKA, } ss:
Lancaster County, }

John C. Deputron, being first duly sworn, on oath says that he is the defendant in this action, and that he believes the facts stated in the foregoing answer to be true.

JOHN C. DEPUTRON.

7 Subscribed in my presence and sworn to before me on this 7th day of July, A. D. 1884.

[SEAL.] NOVIA Z. SNELL,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 348, H. Rowena Young, plaintiff, *vs.* John C. Deputron, defendant. Answer. Filed Jul- 14, 1884. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, attorneys for defendant.

Thereupon, afterwards, at the November term of said court, on the 7th day of December, 1885, the following proceedings were had and done in said cause, as appears of record on folio 507, Journal "K" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Trial. 348, H.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, L. W. Miller; 2, G. W. Walback; 3, Henry Sapp; 4, A. F. Holcomb; 5, James Ireland; 6, John J. Bruner; 7, Samuel Culbertson; 8, P. H. Cooper; 9, W. G. Swan; 10, William D. Thomas; 11, William Hennessy; 12, R. J. Doam, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence, argument, and charge of the court, the jury retired to their room, in charge of a bailiff duly sworn, for deliberation.

And now comes said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

"In the Circuit Court, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant. }

8 We, the jury in this cause, being duly empaneled and sworn, do find and say we find the issues joined in favor of the defendant.

G. W. WALBACK, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that said defendant is the owner of and entitled to the immediate possession of the premises described in the petition herein, and that said defendant recover of and from the said plaintiff his costs herein expended.

And thereupon, on motion of the plaintiff, by Thurston and Hall, attorneys, it is further ordered by the court that the verdict and judgment herein be, and the same are hereby, set aside and a new trial of this cause awarded.

Thereupon, afterwards, at the January term of said court, on the 22nd day of January, 1886, the following proceedings were had and done in said cause, as appears of record on folio 785, Journal "K" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Order to Consolidate. No. 348, H.

On motion, it is ordered by the court that this cause be, and the same are [is] hereby, consolidated with causes numbered 349, H, and 350, H, for trial.

Thereupon, afterwards, at the said January term of said court, on the 11th day of February, 1886, the following proceedings were had and done in said cause, as appears of record on folio 855, Journal "K" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } 348, H.

On motion of plaintiff, by Thurston and Hall, her attor-
9 neys, it is ordered by the court that said plaintiff have leave to reply herein to-day, verification to said reply being waived by defendant's attorneys in open court.

Thereupon, afterwards, to wit, on the 5th day of March, 1886, reply was filed in said case; which said reply is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DUPUTRON, Defendant. } Reply.

Now comes the said plaintiff and, for reply to the answer of said defendant, says—

That she denies that the said defendant ever acquired any title to the premises in said plaintiff's petition described under and by virtue of a tax deed duly and legally executed or by any deed whatsoever, or that said defendant has ever had any deed whatsoever of said property.

And plaintiff denies that the said defendant has ever held possession of said property at any time whatsoever.

And plaintiff denies that the said defendant ever purchased said property, or that said defendant ever paid the sum of ten thousand dollars or any sum whatever for same.

And plaintiff denies each and every allegation in said first cause of defendant's answer set out not heretofore admitted.

And plaintiff, for reply to the second defense — said defendant, says that they [she] deny [denies] each and every allegation in said second defense set out.

And plaintiff denies that the pretended deed set out in the
10 answer of defendant is a true copy of any deed ever executed *and* or through which defendant holds title.

The plaintiff denies each and every allegation in said answer not hereinbefore admitted.

UNITED STATES OF AMERICA.

DISTRICT OF NEBRASKA, } ss:
Lancaster County, }

Richard S. Hall, being duly sworn, on his oath says: I am the attorney of the above-named plaintiff. I have read the above reply and know the facts therein contained, which are true, as I verily believe.

The reason for making this affidavit by affiant is that the plaintiff is a non-resident of and absent from the State of Nebraska.

R. S. HALL.

Signed in my presence and sworn to before me this fifth day of March, A. D. 1886.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 348, H. In U. S. circuit court. Rowena Young *vs.* John C. Deputron. Reply. Filed Mar. 5, 1886. Elmer D. Frank, clerk. Thurston & Hall and J. R. Webster and Frank P. Ireland, pl'ff's att'ys.

Thereupon, afterwards, at the said January term of said court, on the 8th day of March, 1886, the following proceedings were had and done in said cause, as appears of record on folio 50, Journal "L" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Trial. 348, H.

Now come the parties herein, by their attorneys; also come
11 the following-named persons as jurors, to wit: 1, A. J. Wright; 2, E. D. Stoughton; 3, J. K. Whitmore; 4, J. B. Reed; 5, W. H. Keckley; 6, O. J. Martin; 7, J. M. Lee; 8, P. H. Walker; 9, Walter Seeley; 10, D. C. Brown; 11, J. R. Nickols; 12, E. C. Carmes, who were duly empaneled and sworn according to law; and the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning, at ten o'clock.

Thereupon, afterwards, at the said January term of said court, on the 11th day of March, 1886, the following proceedings were had and done in said cause, as appears of record on folio 58, Journal "L" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Cause Submitted to Jury.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein; and thereupon, after hearing the remaining evidence, the argument of counsel, and charge of the court, said jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

Thereupon, afterwards, to wit, at the said January term of said court, on the 12th day of March, 1886, the following proceedings were had and done in said cause, as appears of record on folio 72, Journal "L" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Verdict. 348, H.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn in this cause into open court, and present to the court their special findings and verdict, which is in words and figures following, to wit:

12 In the Circuit Court of the United States, District of Nebraska, January Term. 1886.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant. } Special Findings.

We, the jury, having been duly empaneled to well and truly try the issues joined and a true verdict render in the above-entitled cause, do specially find as follows:

1st. That Jane Y. Irwin obtained title to said lands by patent from the United States December 15th, 1862, and on the 9th of August, 1867, conveyed the same to William P. Young, who, on the 5th of February, 1874, reconveyed the same to Jane Y. Irwin, who, on the 11th day of June, 1884, conveyed said lands to the plaintiff, Rowena Young.

2nd. On the 31st of March, 1874, Jane Y. Irwin and husband entered into a contract with N. S. Scott, Samuel Boyd, and Milton La Master for the selling and subdivision of said lands.

3rd. And said Scott, Boyd, and La Master soon after entered upon said lands under said contract, and staked out the block corners and street intersections, being engaged in the survey on the lands in controversy and other lands for a period of about two months, finishing their survey about the last of May, 1874.

4th. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donavan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd, and La Master, and to facilitate their operations under their contract of March 31st, 1874.

5th. We find that there was no assessment of the land in controversy for taxes in the year 1867, nor was the same borne upon the tax-list of that year.

13 6th. We find the tax deed of June 12th, 1871, executed by John Cadman, county treasurer, was not sealed by the county treasurer with his official seal, nor did the county treasurer then have an official seal.

7th. We find that the county treasurer's deed executed by R. A. Bain, dated September 15th, 1871, was not sealed by the county treasurer, nor did the county treasurer then have an official seal.

8th. We find the forty acres of land sold by the sheriff to E. J. Curson and conveyed by deed October 10th, 1877, was at that time of the value of $20,000.

9th. That the confirmation of sale was set aside by the district court of Lancaster county, in which it had been made November 3rd, 1877, before E. J. Curson had made any conveyance to any one and was never afterwards confirmed.

10th. The jury find that Nelson C. Brock and his grantees had mixed possession of the west half of the southwest quarter of section 24, township 10, range 6, in Lancaster county, Nebraska, for ten years prior to the commencement of this suit, but the jury find that parties claiming under defendant's grantors held portions of said property and parties holding under plaintiff's grantors held portions of said property, so that said possession was in controversy and disputed and mixed down to the year 1877.

11th. That up to the year 1876 the said defendants and their grantors had mixed possession of the land in dispute, to wit, the northeast quarter of the southwest quarter of section 24, township 10, range 6, but said land was open, vacant, and unoccupied, except by the city post-house, and was used as a common.

12th. The jury also find that parties held mixed possession
14 of portions of the west half of the southwest quarter of section 24, township 10, range 6, during the years 1874 and 1875, who did not attorn to or acknowledge possession in either the plaintiff or the defendants or any one under or by whom they claim.

13th. The jury find that the conveyance from Jane Y. Irwin and John Irwin by William T. Donavan, attorney-in-fact, to J. P. Lantz was a fraud upon the power held by said Donavan, and was given by Donavan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such facts, and procured such conveyance to be made with such knowledge and design.

14th. That the said deed by Donavan to Lantz and the deed of same by Lantz to Little were executed at the same time and were parts of one transaction, and that the northeast quarter of the southwest quarter of section 24, town. 10, range 6, was on the 25th day of October, 1879, worth $30,000, and that the balance of the land then by Donavan conveyed would exceed $70,000 in value at that time.

15th. That during the years 1874, 1875, and 1876 parties holding under the grantors of plaintiff held portions of the west half of the southwest quarter of section 24, township 10, range 6.

16th. We find that all the defendants had full knowledge of the revocation of the power of attorney aforesaid upon the record by Jane Y. Irwin and of the facts therein stated prior to any purchase made by them or either of them.

17th. That one N. C. Brock, through whom the defendant traces one chain of his title, on the 12th day of June, 1871, received from the county treasurer of Lancaster county, Nebraska, a tax deed
15 of that date of the north half of and 20 acres off the west side of the southwest quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska, the

premises in controversy being in the northeast quarter of the southwest quarter aforesaid, which tax deed purported to be issued for the taxes assessed against the above-described parcels of land, respectively, for the year 1867, which tax deed was on the 13th day of June, 1871, recorded in the county clerk's office of Lancaster county, Nebraska.

18th. That on the 15th day of December, 1871, the county treasurer of Lancaster county, Nebraska, delivered to said Nelson C. Brock a second tax deed of that date covering the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska, including the property in dispute, which deed was issued for the tax of the year 1868, and which tax deed was on the 18th day of December, 1871, recorded in the county clerk's office of Lancaster county, Nebraska.

19th. That on the 18th day of December, 1871, said Nelson C. Brock made, executed, and delivered to one Charles T. Boggs a lease in writing of that date of the north half of and the southwest quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska, for the term of two years from that date, which lease contained a leave or license to the lessee to remove all buildings placed upon said premises by him on or before the termination of said lease, which said lease was recorded in the county clerk's office of Lancaster county, Nebraska, on the 2d day of January, 1872.

20th. That on the 18th day of December, 1873, the said Nelson C. Brock made, executed, and delivered to said Charles T. Boggs a second lease in writing of that date of the north half and the southwest quarter of the southwest quarter of section 24,
16 town. 10, range 6 east, in Lancaster county, Nebraska, for the term of two years from that date, which said lease contained a similar provision permitting the lessee to remove all buildings and improvements by him erected or permitted to be erected on said premises off from the same at any time before the expiration of the said term therein granted, which lease was on the 5th day of January, 1874, recorded in the county clerk's office of Lancaster county, Nebraska.

21. That in the month of December, 1871, the said Charles T. Boggs, claiming title under the said lease first aforesaid, entered into the mixed possession of the said premises by assuming control and ownership over the same and by collecting rents from squatters and persons then located upon said premises, and subleased other portions of said premises, and continued to exercise mixed possession of said premises down to the time he yielded his mixed possession of the same to Samuel W. Little, and that he paid the rent to N. C. Brock for the said premises during the terms of the two leases above mentioned.

22. That at the expiration of his term under said leases he yielded his mixed possession of the said premises to Samuel W. Little.

23. That on the 18th day of May, 1874, said Nelson C. Brock and his wife, by their deed of quitclaim, conveyed all the said premises, the north half of the southwest quarter and the southwest quarter

of the southwest quarter of section 24, town. 10, range 6 east, to Samuel W. Little, which deed was duly recorded in the county clerk's office of Lancaster county, Nebraska, on the 26th day of May, 1874.

24. That on [in] or about the month of May, 1873, Charles T. Boggs subleased the north half of the southwest quarter of section
16½ 24, town. 10, range 6 east, to one D. A. Gilbert, who, on or about that date, entered upon the mixed possession of the same and erected a ranch for cows or milk ranch on the northwest quarter of said quarter section, all the said north half of said southwest quarter being at the time he entered therein wholly vacant and unoccupied lands, and that he continued under said lease in the mixed possession and occupation of the same until on [in] or about the year 1878, when he moved off his cattle ranch and surrendered his mixed possession of the same at the instance of S. W. Little, having during that period attoned and paid rent to Charles T. Boggs.

25. That in the year 1876 Samuel W. Little began breaking up and actually improving the northeast quarter of said quarter section and erected windmills and placed other valuable improvements thereon, planted trees and shrubbery and set out hedges and other fences, and thence until he delivered his mixed possession of the said property to his several grantees had the mixed possession of the said premises, said northeast quarter of the southwest quarter of section 24, town. 10, range 6 east.

26. That on the 19th day of May, 1877, in the district court of Lancaster county, in the State of Nebraska, at the April term of the said court, in a certain action therein pending, wherein Milo H. Sessions was plaintiff and John Irwin and Jane Y. Irwin were defendants, a judgment was obtained in the said action in favor of the said H. M. Sessions and against said John Irwin and Jane Y. Irwin by the consideration of said court, wherein it was considered by said court that the said plaintiff therein should recover from and against the said defendants, John Irwin and Jane Y. Irwin, the prin-
17 cipal sum of $350, besides costs therein, taxed at the sum of $41.38, and for which said sums execution was awarded out of the said court; that thereafter execution was issued upon said judgment against the said John Irwin and Jane Y. Irwin, and the same coming to the hands of the sheriff of the said county for want of goods and chattels whereon to levy the said writ, he seized and caused to be appraised, advertised, and sold as the property of the said Jane Y. Irwin the northeast quarter of the southwest quarter of section 24, town. 10, range 6, to one E. J. Curson for the sum of $30; that thereafter he made due return of his said sale unto the said district court; and afterwards, on the 2nd day of October, 1877, the following proceedings were had in the said court, to wit:

H. M. Sessions *against* John Irwin and Jane Y. Irwin.

This case comes on upon motion of plaintiff for confirmation of sale heretofore had in this case, and it is hereby ordered by the court that cause be shown by Tuesday next, October 9th, why sale should not be confirmed.

That afterwards, on the 10th day of October, 1877, that being the 9th day of the October, 1877, term of said court, the following proceed ings were had in said action therein:

MILO H. SESSIONS *vs.* JOHN IRWIN and JANE Y. IRWIN.

This case comes on, upon the motion of plaintiff, for confirmation of sale heretofore had under former order of this court, and the court, upon a careful examination of the proceedings thereof, finds that the same have been had in all respects in conformity to law and the orders of this court. It is ordered that the said proceedings and sale be, and they are hereby, approved and confirmed; and it is further ordered by the court that the said sheriff convey to the purchaser, by deed in fee simple, the lands and tenements so sold; that afterwards and on the
18 10th day of October, 1877, pursuant to the foregoing proceedings, Sam. McClay, sheriff of said county, made, executed, and delivered to said E. J. Curson, purchaser, a sheriff's deed of conveyance of the said premises, the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska; which deed was by the said E. J. Curson filed and recorded in the county clerk's office of Lancaster county, Nebraska, on the 10th day of October, 1877, at 5 o'clock p. m.

27. That on the 9th day of November, 1877, said Elijah J. Curson and Anna M. Curson, his wife, by deed of general warranty and for the consideration of the sum of $30, expressed to be in hand paid, granted, bargained, sold, and conveyed the said premises, the northeast quarter of the southwest quarter of section 24, in town. 10, range 6 east, to Samuel W. Little; which deed of conveyance was, on the 26th day of November, 1877, filed and recorded in the county clerk's office of Lancaster county, Nebraska.

28. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donavan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd, and La Master, and to facilitate their operations under their contract of March 31st, 1874.

29. That on the 25th day of October, 1879, the said Jane Y. Irwin and John Irwin, by W. T. Donavan, their attorney-in-fact, for the purported consideration, as expressed upon the face of said deed, of $1,000, made, executed, and delivered to one John P. Lantz their warranty deed conveying the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, and all that portion of the west half of the said southwest quarter of section 24, town. 10, range 6 east, lying north of the center line of R street, in the
19 city of Lincoln, extended east through said lands; and also the following-described parcels of land, situated in the southwest quarter of said southwest quarter of section 24, town. 10, range 6 aforesaid: Commencing at the southwest corner of said section 24, thence running east 520 feet; thence north 460 feet; thence west 520 feet; thence south 460 feet to the place of beginning; and also commencing at a point 460 feet east of the southeast corner of block

No. 38, in the city of Lincoln, and 470 feet north of the south line of O street, in said city of Lincoln; thence running east 760 feet; thence north 400 feet; thence west 760 feet; thence south 400 feet to the place of beginning; which said deed was recorded in the county clerk's office of Lancaster county, Nebraska, on the 25th day of October, 1879, at 4 o'clock and 25 minutes p. m.

30. That on the 25th day of October, 1879, said John P. Lantz and Hannah Lantz, his wife, by their deed of general warranty and for the consideration of $1,000, as expressed in said deed, paid by Samuel W. Little to said John P. Lantz, conveyed the property in the last finding above described to the said Samuel W. Little; which deed was, on the 25th day of October, 1879, at 4 o'clock and 30 minutes p. m., recorded in the county clerk's office of Lancaster county, Nebraska.

31. That neither Jane Y. Irwin nor John Irwin, nor any one for them, ever paid any taxes on any portion of the north half and the southwest quarter of the southwest quarter of section 24, town. 10, range 6 east.

32. That Nelson C. Brock and Samuel W. Little and their respective grantees of any property in dispute herein have paid all taxes assessed against the said property since the entry thereof to the year 1884, under claim of title to said premises.

33. That on the 9th day of August, 1867, John Irwin and Jane Y. Irwin, by their deed of general warranty, conveyed to one William P. Young the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, town. 10, range 6 east, for the purported consideration expressed on the face of the said deed of $490; which said deed was filed and recorded in the county clerk's office of Lancaster county, Nebraska, on the 10th day of August, 1867.

34. That on the 9th day of January, 1875, said Samuel W. Little, by a deed of quitclaim, pursuant to an arrangement made between Jane Y. Irwin and one George Smith and said Samuel W. Little, made, executed, and delivered, for the consideration of $100, a part of the southwest quarter of the southwest quarter of section 24, town. 10, range 6 east; that said S. W. Little had consented to the entry of the said George Smith upon the said parcel of land under the contract for the purchase of the same from Messrs. Scott, Boyd, and La Master.

35. That in the year 1873 one Hickman entered upon the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, under a lease from Charles T. Boggs, and erected thereon stables for a milk ranch and paid rent thereon for said premises at the rate of $12 per annum, and continued to occupy the said premises for such purposes and for feeding and herding his stock thereon for a period of about two years.

36. That from May 31st, 1874, continuously down to the time of the commencement of this suit, June 14th, 1884, Charles T. Boggs and Samuel W. Little and his and their lessees and grantees, under claim of title thereto, held mixed possession of all of the north half of the southwest quarter of section 24, town. 10, range 6 east, and

that no other person occupied the same or entered thereon under claim of title to any part thereof.

21 37. That on the 25th day of September, 1883, Samuel W. Little and Mary D. Little, by their deed of general warranty and for the consideration of the sum of $10,500, sold and conveyed to the defendant, John C. Deputron, all that part of the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, described as follows, and being the premises in dispute: Beginning at a point in the center of R street, in said city, 150 feet east of the east line of 17th street, thence east along the center of R street 600 feet to the center of 19th street; thence north, at right angles with R street, 1,400 feet; thence west, parallel with R street, 750 feet, to the east line of 17th street extended north through R street; thence south along said east line of 17th street 790 feet; thence east, parallel with R street, 94 feet; thence south, parallel with 17th street, 247 feet; thence east, parallel with R street, 38 feet; thence south, parallel with 17th street, 163 feet; thence east along Leighton's north line 18 feet; thence south along Leighton's line 200 feet to the place of beginning, containing 22.15 acres of land; also part of the said northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, described as follows: For a starting point begin at a point 400 feet east of Grand avenue and 200 feet north of R street, at C. M. Leighton's northwest corner, running thence north 410 feet; thence east 94 feet; thence south 247 feet; thence east 38 feet; thence south 163 feet; thence west along Leighton's north line to the place of beginning, the north and south limits to be parallel with Grand avenue and the east and west limits to be parallel with R street; which said deed was recorded on the 6th day of September, 1883, in the county clerk's office of Lancaster county, Nebraska.

22 38. That said Samuel W. Little delivered to the said John C. Depurton the mixed possession of the said premises at the date of the execution of the said deed, and that the said John C. Depurton thence and hitherto has held the mixed possession of the same.

39. That the value of the said premises at the present time is the sum of forty thousand dollars.

40. We find that John C. Depurton, defendant, is a brother-in-law of S. W. Little, his grantor, and that there is no proof of any consideration paid by Deputron to Little for such conveyance.

41. That the value of the land claimed by John C. Depurton, defendant, being 22.15 acres, was worth (40,000) forty thousand dollars.

January 29, 1875, S. W. Little was holding said premises as purchaser at tax sale under certificate of purchase May 26, 1874, for tax of 1872.

If the court is of the opinion that on these facts the plaintiff is entitled to possession of the property in dispute, then we find for the plaintiff.

J. M. LEE, *Foreman.*

Thereupon, afterwards, to wit, on the 15th day of March, 1886, motion was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, State of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant.

Comes now the defendant, John C. Deputron, on this 15th
23 day of March, 1886, and, on reading the verdict and special findings of the jury filed herein, excepts to each of the following special findings, and moves to set aside each of the same, for the reason that neither of the same is supported by any evidence and is contrary to the evidence adduced in said cause, to wit:

1st. The 10th finding of the said jury that Nelson C. Brock and his grantees had mixed possession of the west half of the southwest quarter of sec. 24, township 10, range 6, in Lancaster county, Nebraska, for ten years prior to the commencement of this suit; but the jury find that parties claiming under defendant's grantors held portions of said property and parties holding under plaintiff's grantors held portions of said property, so that said possession was in controversy and disputed and mixed down to the year 1877.

2nd. To the 17th finding of the said jury that there is no proof of any consideration paid by said John C. Deputron upon the purchase by him of the said premises.

3rd. To the last or 19th finding of the said jury that Jan. 26th, 1875, S. W. Little was holding said premises as purchaser of tax sale under certificate of purchase of May 26th, 1874, for the taxes of 1872.

4th. And the said John C. Deputron, upon the foregoing findings and each of them being so set aside, moves the court for a judgment for the defendant and against the plaintiff upon the verdict and special findings returned herein.

LAMB, RICKETTS & WILSON,
Att'ys for the Def't.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 348, H. Rowena Young *vs.*
24 John C. Deputron. Motion. Filed March 15, 1886. Elmer D. Frank, clerk. Lamb, Ricketts and Wilson, defendant's att'ys.

Thereupon, afterwards, to wit, on the 19th of April, 1886, motion for judgment was filed in said case; which said motion is in words and figures following, to wit:

In U. S. Circuit Court, Dist. of Nebraska.

ROWENA YOUNG, Pl'ff,
vs.
JOHN C. DEPUTRON, Def't. } Motion.

Now comes the plaintiff and moves the court for judgment in favor of the plaintiff according to the prayer of the petition upon the special verdict of the jury herein filed.

THURSTON & HALL &
J. R. WEBSTER,
Att'ys for Pl'ff.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 348, H. Young *vs.* Deputron. Motion for judgment. Filed Apr. 19, 1886. Elmer D. Frank, clerk. Thurston & Hall and J. R. Webster, att'y for pl'ff.

Thereupon, afterwards, to wit, at the May term of said court, on the 10th day of May, 1886, the following proceedings were had and done in said cause, as appears of record on folio 157, Journal "L" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } Cause Submitted. No. 348, H.

This cause, coming on to be heard on the motions of plaintiff and defendant for judgment on the special findings herein, was submitted to the court on briefs to be filed by plaintiff in thirty days and by defendant in thirty days thereafter.

Thereupon, afterwards, to wit, at the said May term of said court, on the 24th day of June, 1886, the following proceedings were had and done, as appears of record on folio 239, Journal "L" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } 348, H.

Now come the parties hereto, by their attorneys, and, both parties consenting thereto in open court, it is ordered by the court that the time to settle and sign bill of exceptions herein be, and the same is hereby, extended to the second Monday in November next.

Thereupon, afterwards, to wit, on the 9th day of November, 1887, petition was filed in said case; which said petition is in words and figures following, to wit:

In the United States Circuit Court for the State of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
J. C. DEPUTRON, Defendant. } Petition.

Comes now the defendant, J. C. Deputron, and shows unto this hon. court that they are [he is] the defendants in this case; that at the time this suit was commenced and at this time they are [he was and is a] residents and citizens of the State of Nebraska; that this suit does not really and substantially involve a suit or controversy properly within the jurisdiction of this court, and that the parties to this suit have been illegally and improperly made and joined for the sole purpose of creating a case cognizable in this court and for no other purpose whatever, and that the plaintiff herein at the time this suit was commenced had not nor has she at any time since that
26 time had nor has she now any ownership of or interest in the lands in controversy herein; and your petitioner further shows unto the court that the facts touching said matter are that one Jane Y. Irwin and John Irwin, her husband, since the year 1862 have been and now are residents of the city of Nebraska City, in the State of Nebraska, and that the lands in controversy herein, with other lands, amounting in all to 120 acres, were patented to the said Jane Y. Irwin on the 15th day of December, 1862; that the plaintiff in this cause, Rowena Young, is the sister of the said Jane Y. Irwin; that the said Rowena Young is and since the date last aforesaid has been a resident of Zanesville, in the State of Ohio, and that William P. Young, hereinafter mentioned, is the brother of the said Rowena Young, and also during such time has resided at Zanesville aforesaid; that on or about the 9th day of August, 1867, the said Jane Y. Irwin and her husband made and procured to be recorded and deeded all of the said lands to the said William P. Young for a purported consideration of $490.00, and the said Jane Y. Irwin and John Irwin carried on litigation over the said lands, amounting in all to one hundred and twenty acres, of which these in controversy constituted a part, for a period of about ten years; that on or about the 5th day of February, 1874, there being a civil action pending in the district court of Lancaster county, Nebraska, in which judgment was thereafter rendered for over the sum of $9,000.00, the said William P. Young reconveyed all of said property to the said Jane Y. Irwin; that said original patented title in all of the tract stood and remained of record in the said Jane Y. Irwin (except some small portions which the said Jane Y. Irwin sold) down to about the date of the commencement of this suit, and
27 during all that time she assumed and claimed to own the property; that at or about the time this suit was brought two other like suits were brought in this court by the said Rowena Young against the Lincoln Driving Park Association and one against C. M. Leighton, both residents and citizens of Lincoln, Nebraska, for the recovery of portions of the said lands, the northeast quarter of the southwest quarter of section 24, town. 10, range 6

east, in Lancaster county, Nebraska; which suits, with the pending cause, included all the aforesaid northeast quarter of the said southwest quarter section.

That the value of the property included in the said three suits at the time the said suits were commenced in this court and at the time of the pretended transfer of the same from the said Irwins to the said Rowena Young for the purpose of creating cases cognizable in this court was more than the sum of $—.

That all the lands then were and had been for many years held by the several defendants to said suits in actual, adverse possession under claims of titles through sheriffs' sales, tax deeds, and a power of attorney formerly given by the Iwins.

That the said Rowena Young is over seventy years of age, and was at the time of the pretended transfer to her, hereinafter mentioned, and long prior thereto a woman of no property or money, who had no separate estate, trade, or business, and had never been in the State of Nebraska or seen or known the lands in controversy or anything of their value; that shortly before this and the other said suits were brought in the name of Rowena Young the said Jane Y. Irwin, pursuant to an arrangement made by her with
28 certain attorneys, then and now residents of the State of Nebraska, and without the knowledge, authority, or consent of said Rowena Young or her presence, and without her paying or agreeing to pay any consideration therefor, the said Jane Y. Irwin made a deed to the said Rowena Young, for the purported consideration of $2,000.00, of all the lands included in the said three suits, and then made an agreement with said attorneys at the time for the bringing of this suit and the other two said causes in this court, which agreement then made between them was for the division of the said property or the proceeds of the said suits in case they should recover among the said persons, all residents of the State of Nebraska, in the shares then agreed upon among them; that immediately thereupon, to carry out said arrangement, this and the other two suits were brought without the authority, knowledge, or consent of the said Rowena Young in her name; that the said suits from the time of their commencement hitherto have been carried on without her authority or knowledge and without any expense to her, and they are now being prosecuted in this court under said illegal arrangement, in violation of the statute touching the jurisdiction in this court; that after said several suits were brought, the plaintiff being required by order of the court to give security for costs therein, the said Irwin and Irwin and the said attorneys of the plaintiff, in furtherance of the said arrangement among them, deposited with the clerk of this court certain moneys raised by them as such security in said suits; and your petitioner further shows that the said transfer of the said property in controversy herein by the said Irwin and Irwin to the plaintiff, Rowena Young, to enable them to bring this suit in her name was fictitious; that the said Irwin and Irwin, residents of Nebraska, and her said attorneys,
29 all residents of Nebraska, continue to be the real parties in interest concerning the matters drawn in controversy herein,

notwithstanding the said transfer; that the said plaintiff in the record, Rowena Young, is but a nominal or colorable party, and that this suit is being prosecuted in her name, and her name is being used solely for the purposes of giving this court jurisdiction; that the suit actually involves only a controversy between the said Irwin and Irwin, residents of Nebraska, grantors of the said plaintiff, and this defendant; that your petitioner is informed and believes that since the trial of this cause the said Rowena Young, at the instance of said Jane Y. Irwin, has reconveyed the said property or a part of it or an interest therein to the said Jane Y. Irwin or to her said attorneys; that at all times since the suit was brought said Irwin and Irwin and her attorneys, without the knowledge of the said Rowena Young, have assumed to exercise sole ownership and control over the said property and over the conduct of the said suit; that your petitioner did not have knowledge of the above facts before the trial of this cause.

Wherefore your petitioner prays that the plaintiff, Rowena Young, may be required to answer the premises, and that this defendant may have an opportunity of making due proof of the foregoing allegations; that the court enquire and adjudge whether this suit really and substantially involves a dispute or controversy properly within its jurisdiction, and whether the property in controversy was not conveyed to the plaintiff, to the end that she might be improperly and collusively made a plaintiff herein for the purpose of creating a case cognizable by this court under the laws of the United States, and that the court may proceed no further herein than to dismiss this case, as not properly within its jurisdiction, at the plaintiff's costs; and your petitioner will ever pray.

LAMB, RICKETTS AND WILSON,
Attorneys for Defendants.

STATE OF NEBRASKA, } ss:
Lancaster County, }

J. C. Deputron, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled cause; that he has read the foregoing petition and believes the matters and facts therein contained to be true.

—— ——.

Subscribed in my presence and sworn to before me this — day of ——, 1887.

—— ——,
Notary Public.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 348, H. U. S. circuit court, district of Nebraska. Rowena Young, plaintiff, *vs.* J. C. Deputron. Petition. Filed Nov. 9, 1887. Elmer D. Frank, clerk. Harwood, Ames & Kelly, attorneys for defendant. Lamb, Ricketts and Wilson, attorneys for defendant.

Thereupon, afterwards, to wit, on the 13th day of April, 1888, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant. } First Cause, No. 348, H.

ROWENA YOUNG, Plaintiff,
vs.
THE LINCOLN DRIVING PARK ASSOCIATION, Defendant. } Second Case, No. 350, H.

31 ROWENA YOUNG, Plaintiff,
vs.
CHARLES M. LEIGHTON and HARRIET LEIGHTON, Defendants. } Third Case, No. 349, H.

It is agreed between the plaintiff in the above-entitled cases and each of the defendants in the above-entitled cases, respectively, that the proofs taken in the said several causes or in any one of the several causes, either upon behalf of the plaintiff or defendants, respectively, upon the petition and answers in the said several causes, to dismiss the same for want of jurisdiction of the court may be read in evidence in any of the other of the said cases, subject, however, to such legal objection as may lie to the same for irrelevancy or incompetency, these stipulations being made to save the expense of taking the same testimony in each of said causes.

Signed this — day of April, 1888.

LAMB, RICKETTS & WILSON AND
HARWOOD, AMES & KELLY,
Attorneys for Defendants.
J. R. WEBSTER, *Attorney for Pl'ff.*

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 348, H. Rowena Young, plaintiff, *vs.* John C. Deputron, defendant. Stipulation. Filed Apr. 13, 1888. Elmer D. Frank, clerk. J. R. Webster, attorney for plaintiff. Lamb, Rickets & Wilson & Harwood, Ames and Kelly, attorneys for def'ts.

Thereupon, afterwards, at the January term of said court, on the 16th day of January, 1888, the following proceedings were had and done in said cause, as appears of record on folio 618, Journal "M" of said court, to wit:

ROWENA YOUNG
vs. } 348, H.
JOHN C. DEPUTRON.

On motion of defendant, the time to answer herein is ex-
32 tended to February 1st, 1888. Plaintiff is ruled to reply by February 5th.

Thereupon, afterwards, to wit, on the 31st day of January, 1888, answer was filed in said case; which said answer is in words and figures following, to wit:

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant.
} Answer to Plea in Abatement.

The plaintiff, for answer to defendant's petition for dismissal of the cause for want of jurisdiction, admits that defendants, Jane Y. Irwin and John Irwin, are all resident citizens of the State of Nebraska since before bringing this suit; that said lands was patented to Jane Y. Irwin December 12th, 1862; that plaintiff and William P. Young are brother and sister of Jane Y. Irwin, and are and long have been resident citizens of Zanesville, Ohio.

Plaintiff, advised by counsel, says it is immaterial in this suit what were the considerations of either of the said deeds dated August 9th, 1867, and February 5th, 1874, and is uninformed in respect thereto and denies every allegation respecting the same.

Plaintiff admits bringing the suits against the Lincoln Driving Park Association and Leightons, and that the value of the property in said suits and this suit is about $75,000, and that defendant and its grantors since September 30th, 1876, under color of title of certain void tax deeds, have been in possession of portions of said lands, but without right.

Plaintiff is aged about 65 years and possessed of a moderate estate in her own right, consisting of a farm in Ohio, real estate in
33 the city of Zanesville, and some money at interest, and, while not so wealthy as her adversaries, owns the land in controversy and a modest estate originally inherited from her father's estate.

Plaintiff has never been in the State of Nebraska nor seen the lands in controversy, but has known them by information long prior to this controversy.

Plaintiff denies said lands were conveyed her by Jane Y. Irwin without consideration or without her knowledge or consent, or that the deed was undelivered or remained in possession of said Irwin or her attorneys, or that this or said other suits were brought without authority or knowledge of plaintiff or pursuant to any agreement between said Irwin or any one for her and any person whomsoever for benefit of Jane Y. Irwin. Plaintiff denies this or said other two suits have been instituted or carried on without her authority or knowledge, or that they are prosecuted by said Irwin or her attorneys under the alleged or yet under any illegal agreement whatever.

Plaintiff denies the conveyance to her was fictitious, or that said Irwins or either of them or of their attorneys are the real parties in interest; denies she is a colorable party; avers said conveyance was on good and sufficient consideration, intended to be absolute, and vests her with good title to the property of part whereof from its date of entry she was owner of the equity and is the real party interested.

Plaintiff denies this suit involves a controversy between Jane Y. Irwin or John Irwin or either of them and defendant; that she ever, since date of said deed, reconveyed any of said property to said Irwin, either to the — or to any one whomsoever, and that they are [or] any one has assumed dominion or control over said property.

34 Save that said deed of conveyance has remained unrecorded because the land soon fell into controversy and pending suit no record was necessary, plaintiff denies every allegation not hereinbefore expressly admitted, denied, or avoided, and prays inquiry into the matters alleged; that the petition be dismissed and the court proceed as originally prayed, and for costs.

THURSTON & HALL,
Att'ys for Pl'ff.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 348, H. In U. S. court. Young *vs.* Deputron. Answer to plea in abatement. Filed Jan. 31, 1888. Elmer D. Frank, clerk.

35 Thereupon, afterwards, at the November term of said court, on the 16th day of November, 1888, the following proceedings were had and done in said cause, as appears of record on folio 107, Journal "N" of said court, to wit:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } 348, H.

This cause, coming on for hearing on the petition and application of the defendant to dismiss for want of jurisdiction, was tried to [by] the court, Messrs. Hall and Webster appearing for the plaintiff and Messrs. Lamb, Ricketts and Wilson and Harwood, Ames and Kelly for the defendant; whereupon, after hearing the evidence and argument of counsel and being fully advised in the premises, it is now, on this day, ordered and adjudged by the court that said petition and application be, and the same are hereby, denied; to which ruling and order of the court said defendant, by his attorneys, then and there duly excepted.

Thereupon, afterwards, to wit, on the 17th day of December, 1888, opinion was filed in said case; which said opinion is in words and figures following, to wit:

Circuit Court of the United States, District of Nebraska. In Equity.

ROWENA YOUNG, Complainant,
vs.
JOHN C. DEPUTRON, Defendant. } Opinion.

Motion for judgment upon special findings of fact.

BREWER, *C. J.:*

Complainant's chain of title is brief, direct, and clear, as follows:

36 A patent from the United States, December 16th, 1862, to Jane Y. Irwin; a deed, August 9th, 1867, from her to William P. Young; a reconveyance, February 5th, 1874, from Young to Irwin; a deed, June 11th, 1884, to complainant.

As against this chain of title defendants present three claims: First, a judicial sale; on May 19th, 1877, a judgment was rendered in the district court of Lancaster county against Jane Y. Irwin; execution was issued and sale made October 2nd, 1877, to E. J. Curson; October 10th an order of confirmation was entered, which, at the same time [term] and on November 3rd, was set aside. Curson took this order setting aside the confirmation to the supreme court for review, but it was affirmed.

Curson *vs.* Irwin, 8th Neb., 5.

After the order of confirmation had been set aside Curson made a deed, and from that springs one of the titles upon which defendants rely.

It is the settled law of Nebraska that the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase-money, but upon the confirmation of the sale; also that one purchasing at an execution sale submits himself to the jurisdiction of the court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders or to rescind decrees.

Phillips *vs.* Dawley, 1st Neb., 320.
Bank *vs.* Green, 10 Neb., 134.
Volland *vs.* Wilcox, 17 Neb., 50.
Gregory *vs.* Tingley, 8 Neb., 322.

It follows from these facts and decisions that the sale, though temporarily confirmed, was finally set aside, and that no rights of a third party accrued during the time that the sale was apparently confirmed.

37 Hence this chain of title presented by defendants must fail.

A second chain of title is under a conveyance made by an attorney-in-fact. On the 31st day of March, 1874, Jane Y. Irwin entered into a contract with Scott, Boyd and La Master for the platting and sale of the land. They entered upon the land soon thereafter and surveyed and platted it. On the 24th of August, 1875, Jane Y. Irwin executed a power of attorney to William T. Donavan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and Lamaster and to facilitate their operations under their contract of March, 1874.

On the 25th day of October, 1879, a deed was executed by Donavan, as attorney-in-fact for the land, to one John P. Lantz, who, on the same day, conveyed it to Samuel W. Little. At the time of these conveyances the land was worth $70,000 and the conveyances were made for $1,000. Within a month thereafter a revocation of the power of attorney given to Donavan was placed on record, and the conveyances by the attorney-in-fact to Lantz and by Lantz to Little were made with the intention of defrauding Jane Y. Irwin,

and the revocation of the power of attorney was known to the subsequent purchasers, as well as all the facts stated therein, prior to their purchases.

Obviously the plaintiff's land cannot be taken away by any such transactions as these. When one holding a power of attorney which has been lying dormant for over four years conspires with a third party to make a conveyance in the name of his principal of land worth $70,000 for $1,000 and immediately a revocation of that power of attorney is placed upon the record, clearly the first purchaser acquires no rights, and subsequent purchasers taking with knowledge are in no better condition; but it is earnestly insisted by defendants that these conveyances transferred the legal title, and that what-
38 ever rights plaintiff may have can be established only in a court of equity, and that upon the facts as found judgment must go for defendants. They also insist that on a motion for judgment upon special findings inquiry is limited to the facts stated in the findings, and that the court may not examine the testimony for further facts; and upon this say that the power of attorney is not disclosed in the findings nor the revocation thereof, hence the court has no information as to the terms, limitations, or language of either of these instruments.

It may be that the plaintiff's remedy is in a court of equity, and, in view of the fact that the defendants have paid the taxes for so many years, it is obvious that full protection to the rights of all the parties can be most successfully secured in a court of equity. It may be also that upon this motion I am limited narrowly to a consideration of the facts stated in the findings. Assuming that to be true, it appears from the fourth finding that the power of attorney to Donavan was made "to enable him to make conveyances to purchasers when sales were made by Scott, Boyd & La Master and to facilitate their operations under their contract of March 31st, 1874."

It is not clear from this finding whether the jury mean to affirm that this purpose was expressed on the face of the power of attorney or only that that was the purpose of the parties in executing the instrument.

As the defendants are building up their title and are insisting upon the courts adhering to the facts stated in the findings, it seems to me that I am justified in assuming that this finding shows that such a purpose was expressed on the face of the power of attorney.

It is not shown by any finding that Scott, Boyd & La Master
39 ever made the sale or had anything to do with the sale to Lantz, nor is it shown that the conveyance upon its face purported to be in consummation of a sale made by those gentlemen. For aught that appears, the power of attorney and the deed taken together may have disclosed both the purpose for which the power of attorney was executed, which, of course, operated as a limitation on the power, and a breach of trust in the conveyance. It is true that the meagerness of these findings leaves the matter in considerable doubt; but, in view of the grievous wrong attempted to be consummated by these transactions, as shown by the findings of the

jury, I am constrained to hold against the defendants on this chain of title also, even in this law action.

The remaining chain of title is under certain tax deeds. There were two of these—one for the taxes of the year 1867, and dated on June 12th, 1871, and one for those of 1868, dated December 15th, 1871. There was no assessment of the land in controversy in the year 1867 nor was the same placed upon the tax-list of that year. Neither deed was sealed by the county treasurer with his official seal nor did the county treasurer have an official seal.

Under the decision of the supreme court of Nebraska such tax deeds are void:

Sutton *vs.* Stone, 4 Neb., 323.
Reed *v.* Merrian, 15 Neb., 325.
Hendrix *v.* Boggs, 15 Neb., 472.
Sullivan *v.* Merriam, 16 Neb., 160.
Sloman *v.* Thompson, 16 Neb., 548.
Shelly *v.* Towle, 16 Neb., 195.
Baldwin *v.* Merriam, 16 Neb., 200.

Nor were these deeds coupled with an exclusive and actual adverse possession for ten years.

40 The language of all the separate findings upon a matter of possession affirms only a mixed possession.

The jury having, in the original verdict prepared by counsel and handed to them for their consideration, stricken out such adjectives as "actual, undisputed, exclusive, open, notorious, and adverse," and inserted in lieu thereof the word "mixed," plainly, as I think, indicate thereby their finding that the possession was always a matter of dispute.

Under those circumstances, the deeds being void on their face and not coupled with then [ten] years' open, notorious, exclusive, and adverse possession, this defense also must fail.

These being the only questions, judgment will be entered for plaintiff.

And the case of Rowena Young *vs.* Harriet Leighton *et al.* and the case of Rowena Young *vs.* The Lincoln Driving Park Association are like this, and the same judgment must be entered.

Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 348, H. United States circuit court, district of Nebraska. Rowena Young *vs* John C. Deputron. Opinion. Filed Dec. 17, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the said 17th day of December, 1888, the following proceedings were had and done in said cause, as appears of record on folio 172, Journal "N" of said court, to wit:

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant. } Judgment.

Now, on this seventeenth day of December, A. D. 1888, this cause,

heretofore at this term argued and submitted to the court
41 upon the motions for judgment upon the special verdict herein, heretofore filed, on the opinion of the court herein filed, came on for judgment, and, upon consideration of the special verdict of the jury, the pleadings, and arguments of counsel, the court finds that the motion of the defendant for judgment ought to be, and the same is, overruled, and that the motion of the plaintiff for judgment in her behalf ought to be, and the same is, sustained, and that upon the special verdict and pleadings the plaintiff is entitled to the possession of and is the owner of the lands hereinafter particularly described.

It is therefore considered by the court that the plaintiff, Rowena Young, recover from the defendant, John C. Deputron, the real property described in the petition: Part of the northeast quarter of the southwest quarter of section twenty-four (24), in township ten (10) north, of range six (6) east, and being the premises in dispute, and described, meted, and bounded as follows, viz: Beginning at a point in the center of R street, in said city of Lincoln, one hundred and fifty feet (150 ft.) east of the east line of seventeenth (17th) street, thence east along the center of R street six hundred (600) feet to the center of nineteenth (19th) street; thence north at right angles with R street fourteen hundred (1,400) feet; thence west parallel with R street seven hundred and fifty (750) feet to west line of the northeast quarter of the southwest quarter of said section twenty-four (24); thence south along the west line of said northeast quarter of the southwest quarter of section twenty-four (24) twelve hundred (1,200) feet to the northwest corner of Leighton tract; thence east along
42 Leighton's north line one hundred and fifty (150) feet to Leighton's northeast corner; thence south along Leighton's east line two hundred feet to the place of beginning; and also that plaintiff recover of and from the defendant the costs of this action, taxed at $——.

Thereupon, afterwards, to wit, on the 5th day of January, 1889, bill of exceptions were filed in said cause; which said bill of exceptions are in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska, of the November Term, 1888.

ROWENA YOUNG
vs.
HARRIET M. LEIGHTON and CHARLES LEIGHTON.

ROWENA YOUNG
vs.
THE LINCOLN DRIVING PARK ASSOCIATION

and

ROWENA YOUNG
vs.
JOHN C. DEPUTRON.

Be it remembered that at the November term, 1888, of our said

court the following proceedings were had and taken in the said court before the hon. circuit judge, David J. Brewer, then presiding in each of the above-entitled causes then depending in said court; and thereupon it was agreed in open court that the following testimony and proceedings had and taken in the said causes should apply alike to each of said causes and that this bill of exceptions to be taken should apply to and be filed in each of the said causes.

And thereupon this cause came on to be heard before the court upon the several petitions of the respective defendants for the dismissal of the said several causes and the answers thereto. Each are in words and figures as follows, to wit:

43 And thereupon the testimony was reduced before the court — application to all of said causes—Messrs. Lamb, Ricketts, and Wilson and Harwood, Ames, and Kelly appearing for the defendants in behalf of the said petition for dismissal, and J. R. Webster, Esq., and R. S. Hall, Esq., appearing for the plaintiffs in behalf of the answer thereto—in words and figures as follows:

It is agreed by and between the parties hereto that the testimony taken in one case shall apply to all three of these cases, viz: Rowena Young *vs.* Harriet M. Leighton and Charles Leighton, and Rowena Young *vs.* The Lincoln Driving Park Association, and Rowena Young *vs.* John C. Deputron.

The defendant offers in evidence a quitclaim deed from Jane Y. Irwin to Rowena Young, executed July 11th, 1884. A copy of the same is hereto attached, marked Exhibit "1."

The defendant offers in evidence three summons- issued in the several suits to show that these three suits were brought involving all this property on the 14th day of June, 1884, at Omaha, Nebraska. Copies of the summons- are hereto attached, marked Exhibits "2, 3, and 4."

The defendant offers in evidence the deposition of James McIntosh; received without objection. A copy of same is hereto attached, marked "Exhibit 5."

The defendant offers in evidence the deposition of James A. Wolf. A copy of the same is hereto attached, marked "Exhibit 6."

The defendant offers in evidence the order in this case requiring the plaintiff to give security for costs. A copy of the same is hereto attached, marked "Exhibit 7."

44 The defendant offers in evidence the depositions of William P. Young, Rowena Young, and Harriet Young; received without objection, and the same are hereto attached, marked "Exhibits 8, 9, and 10."

WILLIAM J. ATWELL, sworn for defendant, examined in chief by Mr. LAMB, testified as follows:

I reside in Zanesville, Ohio; have resided there 24 years; am in the real estate business; the firm name is J. E. Shayard & Co.

Q. How long have you been in that firm?

A. The present firm, since one year ago November 1st.

Q. You may state whether or not you are acquainted with Rowena Young.

A. I am acquainted to the extent of having had two conversations with her.

Q. Are you acquainted with H. H. Wilson, an attorney in this case?

A. Yes; I met him.

Q. State whether or not, at the instance of Mr. Wilson, you visited Rowena Young and talked with her about this land in May, 1887.

A. I did; May 17th, I believe.

Q. State just what conversation you had with her at each of those times; all she said to you. Were they both the same day or on different days?

A. No; the second time I refer to I simply met her and she did not converse with me to any extent. I could not say anything about that conversation; there was nothing in regard to this case. I went to see her and she was called out of the room. I talked to her a few moments only in a general way.

45 Q. State the conversation that took place the first time you were there, what you said and what she said about this case; tell all of it, as near as you can recollect.

A. She stated she had some interest in 160 acres of land at Lincoln, Nebraska; that she had never seen the land, and did not know just how it was located, but that her sister, Jane Y. Irwin, of Nebraska, looked after it for her, and she said she did not know whether it was platted, and if it was platted she had never seen any plat of it, but that she understood that at the time the city of Lincoln was laid out or platted this land was supposed to be worth $100,000.00. She said she got it by original entry from the Government 15 years ago. She said she had made some deeds, she had signed some papers, but she did not know for what part or to what extent.

Q. What did she say in regard to any suits being instituted?

A. She did not say anything about any litigation. I asked her if she would trade the land or any part of it for Zanesville real estate, and she said she would not do that; she could not look after it herself; she was old.

Q. Did you ask her anything about any suits that were pending out here, or if she had brought any about the land?

A. I did not ask her that.

Q. Did you ask her anything about any litigation?

A. No, I did not; she didn't mention any litigation at all.

Q. Was there any talk between you and her as to whether it was improved in any way, or whether any of the buildings were on it, or whether anybody had any claim upon it?

A. No; she said she had never seen the land, and did not
46 know the shape and could not tell where it was located. I could not ascertain from her whether it was city property or suburban property, or what.

Q. What did she say as to whether or not she had ever been in Nebraska?

A. She said she had never been in Nebraska.

The cross-examination of this witness is waived.

The defendant offers in evidence a certified copy of the deed from Jane Y. Irwin to William P. Young, dated August 9th, 1867, covering the whole of the 120 acres.

Objected to as immaterial and irrelevant in this controversy; overruled; exception.

The same is hereto attached, marked "Exhibit 11."

The defendant offers in evidence a deed from William P. Young to Jane Y. Irwin, filed and made the 5th day of February, 1874.

Objected to as irrelevant and immaterial; overruled; exception.

A copy of same is hereto attached, marked "Exhibit 12."

The defendant offers in evidence the first interrogatory and answer thereto of Jane Y. Irwin taken in that case upon the trial-in-chief. A copy of same is hereto attached, marked "Exhibit 13."

The defendant offers in evidence the deposition of Wm. H. Donavan.

Objected to as immaterial and irrelevant; overruled; plaintiff excepts.

A copy of same is hereto attached, marked "Exhibit 14."

The defendant read in evidence the second and third findings. Copies of same are hereto attached, marked "Exhibit 15."

The defendant offers in evidence the deposition of John
47 Irwin. Interrogatory six is objected to as not responsive, immaterial, irrelevant, and incompetent; overruled; exception.
The same is hereto attached and marked Exhibit 16."

JOHN C. DEPUTRON, sworn for the defendant, examined in chief by Mr. LAMB, testified as follows:

I reside in the city of Lincoln and am defendant in one of these cases of Rowena Young.

Q. State whether or not, in the year 1886, at the time of the trial before a jury in this case, whether you had any knowledge whatever as to whether or not the plaintiff in that case, Rowena Young, was the owner of that property.

A. I did not know.

Q. State whether or not you knew at that time that the property had been bought by Jane Y. Irwin and John Irwin, her husband, a few days before that suit was brought.

A. I did not.

Cross-examined by Mr. HALL:

Q. How long have you lived in Lincoln?

A. I came to Lincoln in the spring of 1878, I believe.

Q. You got this land, I believe, from Samuel W. Little?

A. Yes, sir.

Q. Do you remember when it was that you bought it?

A. No; I do not recollect exactly.

Q. You say that at the time this suit was brought you did not know that the land had been conveyed to Rowena Young?

A. No, sir; I did not.

Q. Do you know that now?

A. No; I do not. I could not tell what time it was.

Q. You don't know any more than you did about that when you bought the property, in 1878?

A. No, sir.

48 Q. At no time during the course of this transaction has your mind been enlightened on this point—only what Mr. Lamb told you?

A. That is all.

Q. Of your own personal knowledge, you don't know anything about it, do you?

A. I do not, as I understand you.

Q. From your own personal knowledge, you don't know anything about it to-day, right now?

A. No; I confess I do not know much about it.

Q. Your condition of mind is the same now as when this suit was first brought, so far as any information to you personally is concerned?

A. Yes; it is.

It is admitted that Jane Y. Irwin and John Irwin have lived at Nebraska City and made it their home since 1862.

The defendant offers in evidence the deposition of Elizabeth Young; received without objection, and a copy of the same is hereto attached, marked "Exhibit 17."

The defendant offers in evidence the deposition of Emily Roberts; received without objection. A copy of same is hereto attached, marked "Exhibit 18."

The defendant offers in evidence the deposition of Robert Lee; received without objection, except the question, "Did Rowena Young return no personal property for assessment in the years 1878 and 1879?"

Objected to as incompetent, immaterial; overruled; exception.

The part where reference is made to the corner of River and King streets, immediately following the part above objected to, is objected to as immaterial; overruled; exception. The deposition is hereto attached, marked "Exhibit 19."

49 The defendant offers in evidence the deposition of Henry C. Peters. The part referring to two lots on King St. and a piece of property on the Frazeberg road is objected to as incompetent and immaterial; overruled; exception. The deposition is hereto attached, marked "Exhibit 20."

H. H. WILSON, sworn for the defendant, examined in chief by Mr. LAMB, testified as follows:

I reside in the city of Lincoln, Nebraska; am one of the attorneys of the defendant, John C. Deputron, in this case; am practicing law in Lincoln, Nebraska; am one of the firm of Lamb, Ricketts & Wilson.

Q. As an attorney for Mr. Deputron state whether or not in May, 1887, you visited Zanesville, Ohio, on the 16th or 17th of May, 1887.

A. I did.

Q. State whether or not at that time you made the acquaintance of one Rowena Young, residing at Zanesville.

A. I did.

Q. And plaintiff in this case?

A. Yes; I met her on the 17th, and not the 16th.

Q. State for what purpose you met there.

A. I went there to find out whom Rowena Young was, to learn from what source I could whether or not she was the owner of the Irwin part of the title to this property in controversy.

Q. State how many times you called upon her.

A. I saw and talked with her but once, in the forenoon of the 17th day of May, 1887.

Q. You may state what conversation you had with her and what she said touching location and character of this land.

50 Objected to unless the whole conversation is given.

The COURT: Was that the same time of this other gentleman?

A. Yes; it was the same day that he returned and reported to me that he has been there. I was not with him at the time.

The objection is overruled. Plaintiff excepts.

The WITNESS: I went there and told her that I was the party for whom Mr. Atwell acted in going there to offer to trade land, and told her I wanted to learn more about this land in Nebraska. I then asked her where it lay, and she said she did not know exactly, but thought it lay near Lincoln, Nebraska. I then asked her whether this land was broken up and under cultivation or whether it was unbroken prairie, and she said she did not know. I asked her if she knew whether any buildings were on it, and she did not know. I then asked her if she knew that any part of it had been platted and made a part of the city, and she said she did not know whether it had or not. I then asked her whether she would be willing to trade it for some Zanesville property, and she said she did not want to trade; that she has no power to sell that land, but that I might go to Nebraska, to Mrs. Irwin, her sister, and whatever I did with Mrs. Irwin would be all right. I then asked her if I should go there and negotiate with Mrs. Irwin whether it would be necessary to come back to her, and she said it would not. I asked her if I should purchase to whom I should pay the money, and she said to Mrs. Irwin. I asked her if she had ever conveyed this land or any part of it, and she said she had signed deeds, but whether it covered all the land or what part of it she did not know, but she knew she had never got a cent out of it. I then said, I suppose that you did not pay anything for it
51 did you, anyhow. She said my sister said she wanted to give me an interest in the land. I asked if she had that deed in her possession by which she gave her that interest, and she said she

had not; that either the winter after the conveyance or the winter before—I cannot now tell which—that Mrs. Irwin was at Zanesville and took all the papers back to Nebraska. I then said, "Is there any question about the title to any of this property, as I would not want to buy if it hadn't a perfect title?" and she said the title was perfect, so far as she knew. I asked her if there were any lawsuits pending or any litigation in progress concerning the title to this property, and she said there was not. I asked her if she had any lawyers in Nebraska who had anything to do with this property, and she said that a great many years ago that the Irwins had employed some lawyers in a litigation with Young, but she thought that that matter was all settled, and that she never had any lawyers in Nebraska. Then I referred again to the condition of the property, and she simply repeated what she had said before—that she knew nothing about it. At the close of the conversation, we being in the sitting-room and William B. Young, her brother, and his wife being together in the kitchen with an open door between, so that you could hear them talk, William B. Young said to his wife these words—they were within our hearing—William B. Young said: "Reen had better not tell all she knows about that land." Rowena Young, the plaintiff, then said, My brother don't want me to talk about this. That was substantially the close of the conversation. I made some remark that I supposed she had told the facts, and she said, My brother don't want me to say anything about it; and thereafter refused to talk.

52 Cross-examined by Mr. HALL:

Q. That was the same day that Mr. Atwell was there?

A. It was the same day I sent Mr. Atwell to go there, and he came back to me. I suppose he was there.

Q. It is the same day that he testified about being there. You are in no doubt about that?

A. No, sir.

Q. Didn't you get Mr. Atwell to go there?

A. Yes, sir.

Q. You represented to Rowena Young that you were trying to buy this property?

A. I represented just what my conversation represents.

Q. You represented that, did you not?

A. Yes—no, not that I wanted to buy this property, because I did not represent that I knew this property.

Q. What property were you trying to buy that you represented to her?

A. I represented that I wanted to go to Nebraska, and if I liked it I wanted to buy.

Q. Your purpose in going there to see Rowena Young was to find out just what you have testified to?

A. It was to find out whatever was the facts.

Q. You had sent Mr. Atwell there and he had his talk and that was not satisfactory, was it?

A. It was satisfactory so far as he inquired.

Q. The representations that she made to you were entirely different from what she made to Mr. Atwell?

A. I don't know about that.

Q. You heard his testimony?

A. Yes, sir.

Q. Right on the same day she told Mr. Atwell one thing
53 and you another?

A. I do not know; she told me what I testified to.

Q. Didn't Mr. Atwell tell you after he had come back that he had been there?

A. Yes, sir.

Q. You heard Mr. Atwell's testimony on the witness stand?

A. Yes, sir.

Q. Is not the testimony of Mr. Atwell as to what she told him that day diametrically opposite to what you swore to that she told you the same day?

A. That is a pretty nice question. I would not want to decide.

Q. How long were you there when she gave you all this confidence that you have detailed?

A. I think I was there, I would say, from one to two hours.

Q. She talked along with you and gave you everything just as you wanted to have it?

A. I put the questions.

Q. And she sat there and submitted to a cross-examination from you, did she?

A. She did until she was told by her brother she better not.

Q. That was not until you had cross-examined her for two hours?

A. I would not say it was two hours. Until then he said nothing, although he had been in the room.

Q. At the time this was said which you have related the door was all open, so that the rules of evidence would apply and Rowena Young could hear what her brother said, and Mrs. William
54 B. Young was in and out of the room—the door just happened to be open so that Mr. and Mrs. William B. Young could — clearly heard by Rowena Young and be competent testimony in this case.

A. I would not want to decide as to the rules of evidence. The door was open.

Q. It happened that way?

A. I don't know whether it did or not.

Q. What was there in your mind that led you to call attention to the fact that the door was open—what circumstance?

A. The fact that I could hear when he made that remark.

Q. The testimony you have referred to—was Rowena Young so she could hear?

A. She sat on the west side of the room.

Q. I am not asking where she sat.

A. She was within a few feet of the door.

Q. What was there in your mind that led you to say that the door was open and Rowena could hear?

A. My attention was called to the door being open from the fact that we could hear them talk.

Q. What peculiar idea in your mind was it that led you to say that Rowena could also hear?

A. For the reason that she is a person of ordinary hearing and sat much nearer the door than I did.

Q. It was the fact of her being a person of ordinary hearing that led you to inject into your testimony the fact that she could hear?

A. No; it was the position that she was occupying with reference to the door.

Q. You did not refer to the position, but the fact of her hearing.

A. I did; and from my conversation with her I learned
55 that she was a person that could hear ordinary conversation.

Q. Did you represent yourself as coming from Pennsylvania?

A. I think I did.

Q. You are a member of the firm of Lamb, Ricketts & Wilson?

A. Yes, sir.

Q. You are interested in this case?

A. No, sir.

Q. Not interested?

A. Not I.

Q. Not beyond moderation?

A. Not beyond compensation.

Q. To a reasonable extent?

A. Not in the title, but as to a matter of fees.

Q. In the result of it you are interested?

A. No, sir.

Q. You are not at all interested in that?

A. No, sir.

Q. You would rather, as a matter of fact, that the plaintiff would win than the defendant?

A. No; to the contrary.

Q. Then you are a little more interested in it?

A. Not financially interested in the result.

Q. I am not asking financially.

A. I have that same interest that probably every lawyer would have in every case that his name is connected with.

Q. You have that same interest, so far as you can read your own mind, that any other lawyer would have?

A. I would not say any other lawyer.

Q. You do not claim to be more moderate than any other lawyer in your feelings?

A. No; I am probably a fair average—I do not mean in ability.

56 Mr. LAMB: You are asked with regard to your interest and the interest of the firm; the fees of Lamb, Ricketts & Wilson are in no way contingent?

A. No; they have been paid already for the entire litigation ex-

cept in this proceeding, and that would not depend at all upon the result of the finding in this case.

CHARLES L. HALL, sworn for the defendant, examined in chief by Mr. LAMB, testified as follows:

I reside in the city of Lincoln; am a real estate agent engaged in business there, and do some insurance; have resided in Lincoln since June, 1882.

Q. Are you one of the holders of stock in the Driving Park Association?

A. Yes, sir.

Q. Are you acquainted with Jane Y. Irwin and John Irwin, of Nebraska City?

A. I am — John Irwin.

Q. You may state whether or not, about the month of May, 1887, you visited John Irwin at Nebraska City.

A. I did.

Q. In connection with this business?

A. Yes; either the latter part of April or first part of May, 1887.

Q. You may state whether you had any conversation touching this at Lincoln.

A. I had a conversation at Nebraska City with Irwin.

Q. State fully and particularly just what that conversation was.

Objected to on the ground that it does not appear to have been in the presence of plaintiff, incompetent and hearsay.

57 The COURT: I will hear the testimony and save you an exception.

The WITNESS: Mr. Ransom went with me to see Mr. Irwin. I told him where I lived, who I was, and that I was one of the Driving Park Company, a corporation which claimed title to 17 acres of the 40 in this lawsuit, and that we bought the stock from the company in March, 1887, and at the time it was bought the old officers said that negotiations were pending.

Objected to what the officers of the company said.

The WITNESS: That negotiations were pending on the part of the Driving Park Company with the attorney of Rowena Young for settlement of that, and that a proposition had been made by the attorneys to settle the 17 acres for $10,000.00; that just about that time we bought or shortly after those attorneys had notified us that the property had now gone beyond the control of the parties for whom they made the offer of settlement of $10,000.00, and that the contract of purchase had been made with one W. H. B. Stout, of Lincoln, and if we had any desire to secure a settlement we would have to negotiate with Mr. Stout. I said to Mr. Irwin, I want to know the facts about this and whether or not we have any safety in going on and dealing with Mr. Stout. Mr. Irwin said that he believed a contract had been entered into by Mrs. Irwin and Mr. Stout for the sale of the land in that very room where we were sitting in his house, and the contract had been signed, and that $500.00

had been paid by Mr. Stout to apply on that contract of purchase of the 40 acres, and that he thought we could safely go on and deal with Mr. Stout. I asked him who got the $500.00 and he said that Mrs. Irwin got the $500.00—that is, he said all but twenty per
58 cent. of it; 20 %, he said, was retained by the attorneys; that they were to have a fee of 20 % of what they recovered, and that they kept $100.00 and Mrs. Irwin got $400.00. I asked if I could see Mrs. Irwin, and he went out into the kitchen and came back and reported that she did not wish to be seen. I then went down to Mr. Ransom's office, and in about half or three-quarters of an hour more Mr. Irwin came into the office and said he wanted to see me. We went into Mr. Ransom's private room and Mr. Irwin said, "I made a mistake." He says, "I told you that Mrs. Irwin got the $500.00 or $400.00." He says, "She did not get it, but she was owing me for money advanced in that litigation, and I took the $400.00 and applied it on her indebtedness to me." That was about the substance of the conversation I had with Mr. Irwin.

Cross-examined by Mr. WEBSTER:

Q. Rowena Young was not there?
A. No, sir.
Q. You never saw her?
A. No, sir.
Q. The present holders of Driving Park stock bought into this case, you say, in March, 1887?
A. No, not into this case.
Q. Into this property?
A. We bought the stock from the old company.
Q. You bought the stock of this defendant company in March, 1887?
A. Yes, sir.
Q. The stock all changed hands March, 1887?
A. Yes, but this land was only rented; that was all.
Q. There was 35 other acres in the deed?
A. Yes, that the title was clear to.
Q. In other words, they bought a piece of property with
59 the chances of something more?
A. Yes; we bought the stock, and got with it all the rights the company had.
Q. Do you remember what day you were at Nebraska City?
A. I don't remember the day of the month; I think it was Friday.
Q. Do you know what time in March this stock changed hands?
A. Yes; the 14th.
Q. It was in May that you went down there?
A. The latter part of April or early part of May.
Q. You could not state which month?
A. No; not positive.
Q. You were informed, then, that Rowena Young or some one claiming for her had made some contract or option for sale of the ground; you had heard that before going down?

A. Yes, sir.

Q. And that was what made you go down, so as to know if you would be safe in dealing with the new parties, wasn't you?

A. Yes. I would like to explain that. I had gone to Mr. Stout before going to Nebraska City to see what arrangements could be made with him. He said he had a contract for the purchase of the 40 acres—that is, he says, I have a contract with the real parties in interest at Nebraska City; but he says, I don't understand what it is, but I understand——

Q. Rowena Young was not present?

A. No, sir.

The plaintiff objects to the witness stating what was said.

The WITNESS: That is how I came to find out that probably Rowena Young did not have anything to do with it.

60 Q. If he had a contract it would be in writing?

A. Yes, sir.

Q. You wanted to know if you would be safe in dealing with Mr. Stout?

A. Yes, sir.

J. R. WEBSTER, sworn for the defendant, examined in chief by Mr. LAMB, testifies as follows:

Q. Have you in your custody a contract touching this property with W. H. B. Stout?

A. I have a contract that I drew. I held it for Mr. Stout.

Q. Will you let me examine it? (Witness hands a paper to counsel.)

The WITNESS: I have another paper that was drawn at the same time. The matter was not completed and consummated on the day that paper bears date.

Q. Is that the signature of W. H. B. Stout?

A. Yes; that is Mr. Stout's signature.

Q. Did you see the other signature made?

A. I believe I did; yes, sir.

Q. It was made at Nebraska City in your presence?

A. It was made at Nebraska City.

Q. Is that the signature of Jane Y. Irwin?

A. Yes, sir.

The defendant offers the papers referred to in evidence. The same are hereto attached, marked "Exhibit 21."

Cross-examined by Mr. HALL:

Q. State what the real date of this agreement was.

A. The real date was about the 25th of March. The ne-

61 gotiations for that paper had opened a week or ten days earlier than the 12th of March. Mr. Stout got me to negotiate in regard to it, and at the same time that that paper — and as a part of the same transaction there was a power of attorney written, and the matter was not consummated and the papers exchanged or

money paid until the power of attorney had been to Ohio and was acknowledged and returned. That is what fixes it in my mind as being about the 25th.

Q. Have you that power of attorney?

A. I have the power of attorney.

Q. Have you it with you?

A. I have. (Witness produced paper.)

The plaintiff offers the power of attorney in evidence as a part of the cross-examination of this witness; received with objection. Copy of same is hereto attached, marked "Exhibit 22."

Redirect examination by Mr. LAMB:

Q. It was a part of that arrangement that this power of attorney was drawn at the same time that the contract was drawn?

A. At the same time.

Q. Down at Nebraska City?

A. I do not remember whether I drew the paper at Lincoln or Nebraska City; it was all at one time.

Q. And the papers held until the power of attorney should go forward and be executed and returned?

A. Yes; and the money held.

Q. To whom was the money actually paid and by whom?

A. The money, I think, went through Mr. Hall's hands. I acted in the matter for Mr. Stout. I think the money went from Mr. Stout to Mr. Hall.

62 Q. And that is as far as you have any personal knowledge?

A. Yes, sir.

Q. The fact is that the contract in regard to this arrangement was made at Nebraska City with Jane Y. and John Irwin?

A. No; not hardly. The negotiations were between Mr. Stout and I and Mr. Hall, mainly; and on Mrs. Young's — Mrs. Irwin acted in some respects, perhaps, as an intermediator. She went to Ohio to see about it, I think, but whether she went before or after those papers were drawn I cannot remember. She went between January and June; that is all I can say.

Q. Did you meet Mr. John and Mrs. Irwin and have any negotiations with them, and was you present when they did with Mr. Stout or Mr. Hall?

A. No; only at the signing of the papers; that is all the negotiations and only time I was there at all.

Q. Was that before or after the power of attorney had been returned?

A. It was before; the paper was signed at Nebraska City; the contract was signed in Nebraska City the day it bears date, the 12th.

Q. And before the execution of the power of attorney?

A. Yes, sir.

Q. State whether or not you represented Mr. Hall at Nebraska

City. Did you meet him down there when you came back from signing the contract?

A. The Missouri Pacific is the only way that he would probably get to Omaha. I came on the Midland. I think he was expecting to go the same evening to Omaha, but at a later hour.

Q. You left him at Nebraska City?

A. I do not know whether he left a few hours before or after.

63 Q. Is not it a fact that Mr. Hall came around by way of Lincoln?

A. I think not; and yet it might be that he did. I think he was down to Lincoln the previous week.

Q. Isn't it a fact that when he came from the Irwins at Nebraska City he came to Lincoln?

A. He may have come from Nebraska City to Lincoln back with me, but I cannot remember whether he came back with me or came down from Omaha about a week or ten days after.

Q. Then it was about that time?

A. Yes; I know he was at Lincoln with Mr. Stout after the 12th—that is to say, I think, the 13th—of May, or maybe as late as the 25th, but I could not say whether he came from Nebraska City with me or not. I know this: If he went up from Nebraska City with me on the 12th the matter was not consummated that day.

Mr. HALL: I will call your attention to it. Don't you remember that this agreement with Mr. Stout—that is, this memorandum of agreement with Mr. Stout—was held by me for quite a time after that, and was afterwards delivered, after the power of attorney had been returned?

A. I know it was not until the power of attorney returned. As I drafted that paper, I would like to make an explanation. I was acting for Mr. Stout. It says all interest of Rowena Young and Jane Y. Irwin. I would like to said [say] Jane Y. Irwin was inserted.

Objected to.

With this the defendant rests.

Thereupon the court declined to hear testimony upon the part of the plaintiff, and for that reason no further testimony was offered.

64 In the Circuit Court of the United States for the District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
THE LINCOLN DRIVING PARK ASSOCIATION.

Petition.

Comes now the defendant, The Lincoln Driving Park Association, and shows unto this court that it is the defendant in this case; that at the time this suit was commenced and at this time it is a resident and citizen of the State of Nebraska; that this suit does not really and substantially involve a suit or controversy properly within the

jurisdiction of this court, and that the parties to this suit have been illegally and improperly made and joined for the sole purpose of creating a case cognizable in this court, and for no other purpose whatever, and that the plaintiff herein at the time this suit was commenced had not nor has she at any time since that time had nor has she now any ownership of or interest in the lands in controversy herein.

And your petitioner further shows unto the court that the facts touching said matter are that one Jane Y. Irwin and John Irwin, her husband, who are both very old people, since about the year 1862 have been and now are residents of the city of Nebraska City, in the State of Nebraska, and citizens of said State; that the land in controversy herein, with other lands, amounting in all to one hundred and twenty acres, were patented to the said Jane Y. Irwin on the 15th day of December, 1862.

The plaintiff in this cause, Rowena Young, is the sister of the said Jane Y. Irwin, and since the date last aforesaid has been
65 a resident of Zanesville, in the State of Ohio, with William P. Young, hereafter mentioned, who is the brother of the said Rowena Young, and also during such time has resided at Zanesville aforesaid.

That on or about the 9th day of August, 1867, the said Jane Y. Irwin and her husband made and procured to be recorded a deed of all the said lands to the said William P. Young, which was a mere voluntary deed of conveyance for a purported consideration of $490.00, and the said Jane Y. Irwin and John Irwin thereafter carried on litigation over all the said lands of which these in controversy constituted a part for a period of about ten years, in the name of William P. Young or their own names.

That on or about the 15th day of February, 1874, there being a civil action pending against William P. Young in the district court of Lancaster county, Nebraska, in which judgment was thereafter rendered for over the sum of $9,000.00, the said William P. Young, without consideration paid therefor, reconveyed all of said property to the said Jane Y. Irwin; that except the foregoing transfers the original patented title to the said tract stood and remained of record in the said Jane Y. Irwin from the 15th day of December, 1862, down to about the date of the commencement of this suit, and that during all that time she assumed and claimed to own the property.

That about the time this suit was brought two other like suits were brought in this court by the said Rowena Young—one against Harriett Leighton *et al.* and one against J. C. Deputron, both residents and citizens of Lincoln, Nebraska—for the recovery of portions of the said lands, the northeast quarter of the southwest quar-
66 ter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska; which suits, with the pending cause, included all of the aforesaid northeast quarter of the said southwest quarter section.

That the value of the property included in the said three suits at the time the said suits were commenced in this court and at the time of the pretended transfer of the same from the said Irwins to said

Rowena Young for the purpose of creating cases cognizable in this court was more than the sum of $75,000.00; that all the lands then were and had been for years held by the several defendants to said suits in actual adverse possession under claims of titles through sheriffs' sales, tax deeds, and a power of attorney formerly given by the Irwins.

That the said Rowena Young is over seventy years of age, and was at the time of the pretended transfer to her hereinafter mentioned, and long prior thereto, a woman of no property or money, who had no separate estate, trade, or business, and had never been in the State of Nebraska or seen or known the lands in controversy or anything of their value.

That shortly before said transfer and before this and the other said suits were brought in the name of Rowena Young the said Jane Y. Irwin, pursuant to an agreement made by her with certain attorneys then and now residents and citizens of the State of Nebraska, without the knowledge, authority, or consent of said Rowena Young or her presence and without her paying or agreeing to pay any consideration therefor—the said Jane Y. Irwin made a deed of quitclaim, without covenants of warranty, to the said Rowena Young, for the purported consideration of $2,000.00, of all the lands included in the said three suits, which deed was withheld from
67 the records and has remained in the possession and control of said Jane Y. Irwin and her attorneys, and made an agreement with said attorneys at the time for the bringing of this suit and the other two said causes in this court, which agreement then made between them was for the division among them of the said property of [or] the proceeds of the said suits in case they should recover said property in shares then agreed upon among them; that immediately thereupon, to carry out said arrangement, this and the other two suits were brought by said Jane Y. Irwin and her said attorneys without the authority, knowledge, or consent of the said Rowena Young and in her name and in pursuance of said previous arrangements.

That the said suits from the time of their commencement hitherto have been carried on without her authority or knowledge and without any expense to her, and they are now being prosecuted in this court by said Jane Y. Irwin and her attorneys under said illegal arrangement, in violation of the statute touching the jurisdiction on [in] this court.

That after said several suits were brought, the plaintiff being required by order of the court to give security for costs therein, the said Irwin and Irwin and the said attorneys of the plaintiff, in furtherance of the said arrangement among them, deposited with the clerk of this court certain moneys raised by them as such security in said suits.

And your petitioner further shows that the said transfer of the said property in controversy herein by the said Irwin and Irwin to the plaintiff, Rowena Young, to enable them to bring this suit was fictitious; that the said Irwin and Irwin, residents and citizens of Nebraska, and her said attorneys, all residents and citizens of

68 Nebraska, continued to be the real parties in interest concerning the matters drawn in controversy herein, notwithstanding the said transfer; that the said plaintiff in the record, Rowena Young, is but a nominal or colorable party, and that this suit is being prosecuted in her name, and her name is being used solely for the purpose of giving this court jurisdiction.

That the suit actually involves only a controversy between Irwin and Irwin, residents and citizens of Nebraska, grantors of the said plaintiff, and this defendant; that your petitioner is informed and believes that since the trial of this cause the said Rowena Young, at the instance of said Jane Y. Irwin, has reconveyed the said property or a part of it or an interest therein to the said Jane Y. Irwin or to her said attorneys.

That at all times since the suit was brought said Irwin and Irwin and her attorneys, without the knowledge of said Rowena Young, have assumed to exercise sole ownership and control over the conduct of the said suit; that your petitioner did not have any knowledge of the above facts before the trial of this cause.

Wherefore your petitioner prays that the plaintiff, Rowena Young, may be required to answer the premises, and that this defendant may have an opportunity of making due proof of the foregoing allegations.

That the court inquire and adjudge whether this suit really and substantially involves a dispute or controversy properly within its jurisdiction, and whether the property in controversy was not conveyed to the plaintiff to the end that she might be improperly and collusively made a plaintiff herein for the purpose of creating
69 a case cognizable by this court under the laws of the United States, and that the court may proceed no further herein than to dismiss this case, as not properly within its jurisdiction, at the plaintiff's costs; and your petitioner will ever pray.

HARWOOD, AMES & KELLY,
LAMB, RICKETTS & WILSON,
Attorneys for Defendant.

STATE OF NEBRASKA, } ss:
Lancaster County, }

—— ——, being first duly sworn, deposes and says that he is the secretary of the defendant company in the above-entitled cause; that he has read the foregoing petition and believes the matters and facts therein contained to be true.

J. H. McCLAY.

Subscribed in my presence and sworn to before me this 7th day of Nov., 1887.

[SEAL.]

R. H. OAKLEY,
Notary Public.

In the United States Circuit Court for the State of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
J. C. DEPUTRON, Defendant.

Petition.

Comes now the defendant, J. C. Deputron, and shows unto this hon. court that they [he] are [is] the defendants in this case; that at the time this suit was commenced and at this time they [he] are [is] residents and citizens of the State of Nebraska; that this suit does not really and substantially involve a suit or controversy properly within the jurisdiction of this court, and that the parties
70 to this suit have been illegally and improperly made and joined for the sole purpose of creating a case cognizable in this court and for no other purpose whatever, and that the plaintiff herein at the time this suit was commenced had not nor has she at any time since that time had nor has she now any ownership of or interest in the lands in controversy herein; and your petitioner further shows unto the court that the facts touching said matter are that one Jane Y. Irwin and John Irwin, her husband, since the year 1862, have been and now are residents of the city of Nebraska City, in the State of Nebraska, and that the lands in controversy herein, with other lands, amounting in all to 120 acres, were patented to the said Jane Y. Irwin on the 15th day of December, 1862; that the plaintiff in this cause, Rowena Young, is the sister of the said Jane Y. Irwin; that the said Rowena Young is and since the date last aforesaid has been a resident of Zanesville, in the State of Ohio, and that William P. Young, hereinafter mentioned, is the brother of the said Rowena Young, and also during such time has resided at Zanesville aforesaid; that on or about the 9th day of August, 1867, the said Jane Y. Irwin and her husband made and procured to be recorded and deeded all of the said lands to the said William P. Young for a purported consideration of $490.00, and the said Jane Y. Irwin and John Irwin carried on litigation over the said lands, amounting in all to one hundred and twenty acres, of which these in controversy constituted a part, for a period of about ten years; that on or about the 5th day of February, 1874, their [there] being a civil action pending in the district court of Lancaster county, Nebraska, in which judgment was thereafter rendered for over the sum of $9,000.00, the said William P.
Young reconveyed all of said property to the said
71 Jane Y. Irwin that said original patented title in all of the tract stood and remained of record in the said Jane Y. Irwin (except some small portions which the said Jane Y. Irwin sold) down to about the date of the commencement of this suit, and that during all that time she assumed and claimed to own the property; that at or about the time this suit was brought two other like suits were brought in this court by the said Rowena Young against

the Lincoln Driving Park Association and one against C. M. Leighton, both residents and citizens of Lincoln, Nebraska, for the recovery of portions of the said lands, the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska, which suits, with the pending cause, included all the aforesaid northeast quarter of the said southwest quarter section; that the value of the property included in the said three suits, at the time the said suits were commenced in this court and at the time of the pretended transfer of the same from the said Irwins to the said Rowena Young for the purpose of creating cases cognizable in this court, was more than the sum of $—.

That all the lands then were and had been for many years held by the several defendants to said suits in actual adverse possession under claims of titles through sheriff's sales, tax deeds, and a power of attorney formerly given by the Irwins.

That the said Rowena Young is over seventy years of age, and was, at the time of the pretended transfer to her hereinafter mentioned and long prior thereto, a woman of no property or money, who had no separate estate, trade, or business, and had never been in the State of Nebraska or seen or known the lands
72 in controversy or anything of their value; that shortly before this and the other said suits were brought in the name of Rowena Young the said Jane Y. Irwin, pursuant to an arrangement made by her with certain attorneys then and now residents of the State of Nebraska, and without the knowledge, authority, or consent of said Rowena Young or her presence, and without her paying or agreeing to pay any consideration therefor, *the said Jane Y. Irwin* made a deed to the said Rowena Young, for the purported consideration of $2,000.00, of all the lands included in the said three suits, and then made an agreement with said attorneys at the time for the bringing of this suit and the other two said causes in this court, which agreement then made between them was for the division of the said property or the proceeds of the said suits, in case they should recover, among the said persons, all residents of the State of Nebraska, in the shares then agreed upon among them; that immediately thereupon, to carry out said arrangement, this and the other two suits were brought, without the authority, knowledge, or consent of the said Rowena Young, in her name; that the said suits, from the time of their commencement hitherto, have been carried on without her authority or knowledge and without any expense to her, and they are now being prosecuted in this court under said illegal arrangement, in violation of the statute touching the jurisdiction in this court; that after said several suits were brought, the plaintiff being required by order of the court to give security for costs therein, the said Irwin and Irwin and the said attorneys of the plaintiff, in furtherance of the said arrangement among them, deposited with the clerk of this court certain moneys raised by them as such security in said suits; and your petitioner further shows
73 that the said transfer of the said property in controversy herein by the said Irwin and Irwin to the plaintiff, Rowena Young, to enable them to bring this suit in her name, was fictitious;

that the said Irwin and Irwin, residents of Nebraska, and her said attorneys, all residents of Nebraska, continue to be the real parties in interest concerning the matters drawn in controversy herein, notwithstanding the said transfer; that the said plaintiff in the record, Rowena Young, is but a nominal or colorable party, and that this suit is being prosecuted in her name, and her name is being used solely for the purpose of giving this court jurisdiction; that the suit actually involves only a controversy between the said Irwin and Irwin, residents of Nebraska, grantors of the said plaintiff, and this defendant; that your petitioner is informed and believes that since the trial of this cause the said Rowena Young, at the instance of said Jane Y. Irwin, has reconveyed the said property or a part of it or an interest therein to the said Jane Y. Irwin or to her said attorneys; that at all times since the suit was brought said Irwin and Irwin and her attorneys, without the knowledge of the said Rowena Young, have assumed to exercise sole ownership and control over the said property and over the conduct of the said suit; that your petitioner did not have knowledge of the above facts before the trial of this cause.

Wherefore your petitioner prays that the plaintiff, Rowena Young, may be required to answer the premises, and that this defendant may have an opportunity of making due proof of the foregoing allegations; that the court enquire and adjudge whether this suit really and substantially involves a dispute or controversy properly within its jurisdiction, and whether the property in contro-
74 versy was not conveyed to the plaintiff to the end that she might be improperly and collusively made a plaintiff herein for the purpose of creating a case cognizable by this court under the laws of the United States, and that the court may proceed no further herein than to dismiss this case as not properly within its jurisdiction, at the plaintiff's costs; and your petitioner will ever pray.

LAMB, RICKETTS AND WILSON,
Attorneys for Defendants.

STATE OF NEBRASKA, } ss:
Lancaster County, }

J. C. Deputron, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled cause; that he has read the foregoing petition and believes the matters and facts therein contained to be true.

—— ——.

Subscribed in my presence and sworn to before me this — day of ——, 1887.

—— ——,
Notary Public.

In the Circuit Court of the United States for the District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
HARRIET LEIGHTON *et al.*, Defendants.

Petition.

Comes now the defendants, Harriet M. Leighton and Charles Leighton, and shows unto this hon. court that they are the defendants in this case; that at the time this suit was commenced
75 and at this time they are residents and citizens of the State of Nebraska.

That this suit does not really and substantially involve a suit or controversy properly within the jurisdiction of this court, and that the parties to this suit have been illegally and improperly made and joined for the sole purpose of creating a case cognizable in this court and for no other purpose whatever, and that the plaintiff herein, at the time this suit was commenced, had not, nor has she at any time since that time had nor has she now, any ownership of or interest in the lands in controversy herein.

And your petitioner further shows unto the court that the facts touching said matter are that one Jane Y. Irwin and John Irwin, her husband, who are both very old people, since about the year 1862 have been and now are residents of the city of Nebraska City, in the State of Nebraska, and citizens of said State; that the land in controversy herein, with other lands, amounting in all to one hundred and twenty acres, were patented to the said Jane Y. Irwin on the 15th day of December, 1862.

The plaintiff in this cause, Rowena Young, is the sister of the said Jane Y. Irwin, and since the date last aforesaid has been a resident of Zanesville, in the State of Ohio, with William P. Young, hereinafter mentioned, who is the brother of the said Rowena Young, and also during such time has resided at Zanesville aforesaid.

That on or about the 9th day of August, 1867, the said Jane Y. Irwin and her husband made and procured to be recorded a deed of all the said lands to the said William P. Young, which was a mere voluntary deed of conveyance for a purported consideration of
76 $490.00, and the said Jane Y. Irwin and John Irwin thereafter carried on litigation over all the said lands, of which these in controversy constituted a part, for a period of about ten years in the name of William P. Young or their own names.

That on or about the 15th day of February, 1874, there being a civil action pending against William P. Young in the district court of Lancaster county, Nebraska, in which judgment was thereafter rendered for over the sum of $9,000.00, the said William P. Young, without consideration paid therefor, reconveyed all of said property to the said Jane Y. Irwin; that except the foregoing transfers the original patented title to the said tract stood and remained of

record in the said Jane Y. Irwin from the 15th day of December, 1862, down to the date of the commencement of this suit, and that during all that time she assumed and claimed to own the property.

That about the time this suit was brought two other like suits were brought in this court by the said Rowena Young, one against the Lincoln Driving Park Association and one against J. C. Deputron, both residents and citizens of Lincoln, Nebraska, for the recovery of portions of the said lands, the northeast quarter of the southwest quarter of section 24, town. 10, range 6 east, in Lancaster county, Nebraska, which suits, with the pending cause, include all the aforesaid northeast quarter of the said southwest quarter section.

That the value of the property included in the said three suits, at the time the said suits were commenced in this court and at the time of the pretended transfer of the same from the said Irwins to the said Rowena Young for the purposes of creating cases cognizable in this court, was more than the sum of $75,000.00; that all
77 the lands then were and had been for many years held by the several defendants to said suits in actual adverse possession under claims of titles through sheriffs' sales, tax deeds, and a power of attorney formerly given by the Irwins.

That the said Rowena Young is over seventy years of age, and was, at the time of the pretended transfer to her hereinafter mentioned and long prior thereto, a woman of no property or money, who had no separate estate, trade, or business, and had never been in the State of Nebraska or seen or known the lands in controversy or anything of their value.

That shortly before said transfer and before this and the other said suits were brought in the name of Rowena Young the said Jane Y. Irwin, pursuant to an arrangement made by her with certain attorneys then and now residents and citizens of the State of Nebraska, without the knowledge, authority, or consent of said Rowena Young or her presence, and without her paying or agreeing to pay any consideration therefor, *the said Jane Y. Irwin* made a deed of quitclaim, without covenants of warranty, to the said Rowena Young, for the purported consideration of $2,000.00, of all the lands included in the said three suits, which deed was withheld from the records and has remained in the possession and control of said Jane Y. Irwin and her attorneys, and made an agreement with said attorneys at the time for the bringing of this suit and the other two said causes in this court, which agreement then made between them was for the division among them of the said property or the proceeds of the said suits, in case they should recover said property, in shares then agreed upon among them; that immediately thereupon, to carry out said arrangement, this and the other two suits were brought
78 by said Jane Y. Irwin and her said attorneys without the authority, knowledge, or consent of the said Rowena Young and in her name and in pursuance of said previous arrangements.

That the said suits, from the time of their commencement hitherto, have been carried on without her authority or knowledge and without any expense to her, and they are now being prosecuted in this

court by said Jane Y. Irwin and her attorneys under said illegal arrangement, in violation of the statute touching the jurisdiction of this court.

That after said several suits were brought, the plaintiff being required by order of the court to give security for costs therein, the said Irwin and Irwin and the said attorneys of the plaintiff, in furtherance of the said arrangement among them, deposited with the clerk of this court certain moneys raised by them as such security in said suits.

And your petitioner further shows that the said transfer of the said property in controversy herein by the said Irwin and Irwin to the plaintiff, Rowena Young, to enable them to bring this suit was fictitious; that the said Irwin and Irwin, residents and citizens of Nebraska, and her said attorneys, all residents and citizens of Nebraska, continue to be the real parties in interest concerning the matters drawn in controversy herein, notwithstanding the said transfer; that the said plaintiff in the record, Rowena Young, is but a nominal or colorable party, and that this suit is being prosecuted in her name and her name is being used solely for the purposes of giving this court jurisdiction.

That the suit actually involves only a controversy between Irwin and Irwin, residents and citizens of Nebraska, grantors of the said plaintiff, and this defendant; that your petitioner is informed
79 and believes that since the trial of this cause the said Rowena Young, at the instance of said Jane Y. Irwin, has reconveyed the said property or a part of it or an interest therein to the said Jane Y. Irwin or to her said attorneys.

That at all times since the suit was brought said Irwin and Irwin and her attorneys, without the knowledge of the said Rowena Young, have assumed to exercise sole ownership and control over the said property, and have entered into a contract for the sale of the same, as though no transfer had been made and control over the conduct of the said suit; that your petitioner did not have any knowledge of the above facts before the trial of this cause.

Wherefore your petitioner prays that the plaintiff, Rowena Young, may be required to answer the premises, and that this defendant may have an opportunity of making due proof of the foregoing allegations; that the court inquire and adjudge whether this suit really and substantially involves a dispute or controversy properly within its jurisdiction, and whether the property in controversy was not conveyed to the plaintiff to the end that she might be improperly and collusively made a plaintiff herein for the purposes of creating a case cognizable by this court under the laws of the United States, and that the court may proceed no further herein than to dismiss this case as not properly within its jurisdiction, at the plaintiff's costs; and your petitioner will ever pray.

HARWOOD, AMES & KELLY AND
LAMB, RICKETTS & WILSON,
Attorneys for Defendants.

STATE OF NEBRASKA, } ss:
Lancaster County, }

80 Chas. M. Leighton, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled cause; that he has read the foregoing petition and believes the matters and facts therein contained to be true.

CHAS. M. LEIGHTON.

Subscribed in my presence and sworn to before me this 7th day of November, 1887.

[SEAL.] EDSON RICH,
Notary Public.

In the Circuit Court of the United States for the District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
HARRIET M. LEIGHTON, Defendant. } Answer to Plea in Abatement.

The plaintiff, for answer to defendant's petition for dismissal of the cause for want of jurisdiction, admits that defendants, Jane Y. Irwin and John Irwin, are all residents and citizens of the State of Nebraska since before bringing this suit; that said land was patented to Jane Y. Irwin December 12th, 1862; that plaintiff and William P. Young are brother and sister of Jane Y. Irwin, and are and long have been resident citizens of Zanesville, Ohio.

Plaintiff, advised by counsel, says it is immaterial in this suit what were the considerations of either of said deeds dated August 9th, 1867, and February 5th, 1874, and is uninformed in respect thereto and denies every allegation respecting the same.

Plaintiff admits bringing the suits against said Deputron and the said The Lincoln Driving Park Association, and that
81 the value of the property in said suits and this suit is about $75,000, and that defendant and its grantors since September 30th, 1876, under color of title of certain void tax deeds, have been in possession of portions of said lands, but without right.

Plaintiff is aged about 65 years and possessed of a moderate estate in her own right, consisting of a farm in Ohio, real estate in the city of Zanesville, and some money at interest, and, while not so wealthy as her adversaries, owns the land in controversy and a modest estate originally inherited from her father's estate.

Plaintiff has never been in the State of Nebraska nor seen the lands in controversy, but has known them by information long prior to this controversy.

Plaintiff denies said lands were conveyed her by Jane Y. Irwin without consideration or without her knowledge or consent, or that the deed was undelivered or remained in possession of said Irwin or her attorneys, or that this or said other suits were brought without authority or knowledge of plaintiff or pursuant to any agreement between said Irwin or any one for her and any person whomsoever for benefit of Jane Y. Irwin. Plaintiff denies this or said other two

suits have been instituted or carried on without her authority or knowledge, or that they are prosecuted by said Irwin or her attorneys under the alleged or yet under any illegal agreement whatever.

Plaintiff denies the conveyance to her was fictitious or that said Irwins or either of them or of their attorneys are the real parties in interest; denies she is a colorable party; avers said conveyance was, on good and sufficient consideration, intended to be absolute,
82 and vests her with good title to the property, of part whereof, from its date of entry, she was owner of the equity, and is the real party interested.

Plaintiff denies this suit involves a controversy between Jane Y. Irwin or John Irwin or either of them and defendant; that she ever, since the date of said deed, reconveyed any of said property to said Irwins, either of them, or to any one whomsoever, or that they or any one has assumed dominion or control over said property; save that said deed of conveyance has remained unrecorded because the land soon fell into controversy and, pending suit, no record was necessary, plaintiff denies every allegation not hereinbefore expressly admitted, denied, or avoided, and prays enquiry into the matters alleged; that the petition be dismissed and the court proceed as originally prayed for, and for costs.

THURSTON & HALL,
Att'ys for Pl'ff.

In the Circuit Court of the United States, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
JOHN C. DEPUTRON, Defendant. } Answer to Plea in Abatement.

The plaintiff, for answer to defendant's petition for dismissal of the cause for want of jurisdiction, admits that defendants, Jane Y. Irwin and John Irwin, are all resident citizens of the State of Nebraska since before bringing this suit; that said land was patented to Jane Y. Irwin December 12th, 1862; that plaintiff and William P. Young are brother and sister of Jane Y. Irwin, and are and long have been resident citizens of Zanesville, Ohio.

83 Plaintiff, advised by counsel, says it is immaterial in this suit what were the considerations of either of said deeds dated August 9th, 1867, and February 5th, 1874, and is uninformed in respect thereto, and denies every allegation respecting the same.

Plaintiff admits bringing the suits against the Lincoln Driving Park Association and Leightons, and that the value of the property in said suits and this suit is about $75,000, and that defendants and its grantors, since September 30th, 1876, under color of title of certain void tax deeds, have been in possession of portions of said lands, but without right.

Plaintiff is aged about 65 years and possessed of a moderate estate in her own right, consisting of a farm in Ohio, real estate in the city of Zanesville, and some money at interest, and, while not so

wealthy as her adversaries, owns the land in controversy and a modest estate originally inherited from her father's estate.

Plaintiff has never been in the State of Nebraska nor seen the lands in controversy, but has known them by information long prior to this controversy.

Plaintiff denies said lands were conveyed her by Jane Y. Irwin without consideration or without her knowledge or consent, or that the deed was undelivered or remained in possession of said Irwin or her attorneys, or that this or said other suits were brought without authority or knowledge of plaintiff or pursuant to any agreement between said Irwin or any one for her and any person whomsoever for benefit of Jane Y. Irwin, plaintiff; denies this or said other two suits have been instituted or carried on without her authority or consent, or that they are prosecuted by said Irwin or her
84 attorneys under the alleged or yet under any illegal agreement whatever.

Plaintiff denies the conveyance to her was fictitious, or that said Irwins or either of them or of their attorneys are the real parties in interest; denies she is a colorable party; avers said conveyance was, on good and sufficient consideration, intended to be absolute, and vests her with good title to the property, of part whereof, from its date of entry, she was owner of the equity, and is the real party interested.

Plaintiff denies this suit involves a controversy between Jane Y. Irwin or John Irwin or either of them and defendant; that she ever, since date of said deed, reconveyed any of said property to said Irwins, either of them, or to any one whomsoever, or that they or any one has assumed dominion or control over said property.

Save that said deed of conveyance had remained unrecorded because the land soon fell into controversy and, pending suit, no record was necessary, plaintiff denies every allegation not hereinbefore expressly admitted, denied, or avoided, and prays inquiry into the matters alleged; that the petition be dismissed and the court proceed as originally prayed, and for costs.

THURSTON & HALL,
Att'ys for Pl'ff.

85 In the Circuit Court of the United States, District of Nebraska.

ROWENA YOUNG, Plaintiff,
vs.
THE LINCOLN DRIVING PARK ASSOCIATION, Defendant. } Answer to Plea in Abatement.

The plaintiff, for answer to defendant's petition for dismissal of the cause for want of jurisdiction, admits that defendants, Jane Y. Irwin and John Irwin, are all resident citizens of the State of Nebraska since before bringing this suit; that said land was patented to Jane Y. Irwin December 12th, 1862; that plaintiff and William P. Young are brother and sister of Jane Y. Irwin, and are and long have been resident citizens of Zanesville, Ohio.

Plaintiff, advised by counsel, says it is immaterial in this suit what were the considerations of either of said deeds dated August 9th, 1867, and February 5th, 1874, and is uninformed in respect thereto, and denies every allegation respecting the same.

Plaintiff admits bringing the suits against said Deputron and said Leightons, and that the value of the property in said suits and this suit is about $75,000, and that defendant and its grantors, since September 30th, 1876, under color of title of certain void tax deeds, have been in possession of portions of said lands, but without right.

Plaintiff is aged about 65 years and possessed of a moderate estate in her own right, consisting of a farm in Ohio, real estate in the city of Zanesville, and some money at interest, and, while not so wealthy as her adversaries, owns the land in controversy and a modest
86 estate originally inherited from her father's estate.

Plaintiff has never been in the State of Nebraska nor seen the lands in controversy, but has known them by information long prior to this controversy.

Plaintiff denies said lands were conveyed to her by Jane Y. Irwin without consideration or without her knowledge or consent, or that the deed was undelivered or remained in possession of said Irwin or her attorneys, or that this or said other suits were brought without authority or knowledge of plaintiffs or pursuant to any agreement between said Irwin or any one for her and any person whomsoever for benefit of Jane Y. Irwin. Plaintiff denies this or said other two suits have been instituted or carried on without her authority or knowledge, or that they are prosecuted by said Irwin or her attorneys under the alleged or yet under any illegal agreement whatever.

Plaintiff denies the conveyance to her was fictitious, or that said Irwins or either of them or of their attorneys are the real parties in interest; denies she is a colorable party; avers said conveyance was, on good and sufficient consideration, intended to be absolute and vests her with good title to the property, of part whereof, from its date of entry, she was owner of the equity and is the real party interested.

Plaintiff denies this suit involves a controversy between Jane Y. Irwin or John Irwin or either of them and defendant; that she ever, since date of said deed, reconveyed any of said property to said Irwins, either of them, or to any one whomsoever, or that they or any one has assumed dominion or control over said property.
87 Save that said deed of conveyance has remained unrecorded because the land soon fell into controversy and, pending suit, no record was necessary, plaintiff denies every allegation not hereinbefore expressly admitted, denied, or avoided, and prays inquiry into the matters alleged; that the petition be dismissed and the court proceed as originally prayed and for costs.

THURSTON & HALL,
For Plaintiff.

Also, to further maintain the issues in this case, the defendant offers in evidence the quitclaim deed reading as follows:

EXHIBIT "1."

Quitclaim Deed.

Know all men by these presents that Jane Y. Irwin and John Irwin, wife and husband, of Nebraska City, in the county of Otoe and State of Nebraska, for the consideration of one thousand dollars, hereby quitclaim and convey to Rowena Young, of the county — Muskingum and State of Ohio, the following-described real estate, situate in the ——, in the county of Lancaster and State of Nebraska, to wit:

The northeast quarter of the southwest quarter of section twenty-four (24), township ten (10) north, of range six (6) east, of the sixth principal meridian, according to the Government survey.

In witness whereof we have set our hands this eleventh day of June, 1884.

JANE Y. IRWIN.
JOHN IRWIN.

In presence of—
FRANK P. IRELAND.

88 THE STATE OF NEBRASKA, *Otoe County,* } *ss:*

Be it remembered that on the eleventh day of June, 1884, before the undersigned, Frank P. Ireland, a notary public in and for said county, personally came Jane Y. Irwin and John Irwin, to me known to be the identical persons described in and who executed the foregoing deed as grantors, and they acknowledged said instrument to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] FRANK P. IRELAND,
Notary Public.

Endorsed on the back of deed: Quitclaim from Jane Y. Irwin and John Irwin to Rowena Young. The State of Nebraska, —— county, *ss.* Filed for record in the clerk's office of said county the — day of ——, 18—, at — o'clock and — minutes — m., and recorded in Book — of Deeds, on page —. —— ——, county clerk.

"EXHIBIT 2."

In order further to maintain the issues in this case the defendant offers in evidence the following exhibits:

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendant, The Lincoln

Driving Park Association, a corporation, that it has been sued by Rowena Young in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha, Nebraska; that, unless it answer by the 14th day of July, A. D. 1884, the petition of the said
89 plaintiff this day filed against it in the clerk's office of said court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of June, A. D. 1884.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of June, A. D. 1884, and in the 108th year of the Independence of the United States of America.

[SEAL.] Attest: ELMER D. FRANK, *Clerk.*

I certify the above and foregoing to be a true copy of the original summons now in my hands.

——— ———,
U. S. Marshal,
By ——— ———,
Deputy U. S. Marshal.

(Returned slip attached.)

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 16th day of June, 1884, I received this summons, and on the 16th day of June, 1884, I served the same upon the within named The Lincoln Driving Park Association, upon J. J. Inhoff, president of said company, in Lincoln, Lancaster county, State and district of Nebraska, by delivering to and leaving with J. J. Inhoff, president of the defendant company, a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska.
By A. G. HASTINGS,
Deputy United States Marshal.

Service	$4 00
Mileage	4 08
2 copies	60
Marshal's costs	$8 68

90 (Return slip attached.)

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 16th day of June, 1884, I received this summons, and on the 16th day of June, 1884, I served the same upon the within-named defendants, The Lincoln Driving Park Company, upon O. M. Druse, secretary of said company, in Lancaster county, State and district of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at

the usual place of abode of the said defendant, O. M. Druse, with an adult person and resident in the family of said defendant, O. M. Druse.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By A. G. HASTINGS,
Deputy United States Marshal.

Marshal's costs, —.

(Endorsements upon first return slip:) Filed Jun- 20, 1884. Elmer D. Frank, clerk.

(Endorsements upon second return slip:) Filed Jun- 20, 1884. Elmer D. Frank, clerk.

(Endorsements on summons:) No. 350, doc. H. United States circuit court, district of Nebraska. Rowena Young *vs.* The Lincoln Driving Park Association. Summons. Amount claimed of the defendant by the plaintiff is $—, possession of the E. ½ of the N. E. ¼ of the — S. W. ¼ of sec. 24, township 10 N, of range 6 east, and for costs of suit. Returned and filed this —. Filed June 20, 1884. Elmer D. Frank, clerk. Thurston and Hall, att'ys for pl'ff.

91 "EXHIBIT 3."

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendants, Harriet M. Leighton and Charles Leighton, that they have been sued by Rowena Young in the circuit court of the United States for the district of Nebraska, at Omaha, Nebraska; that, unless they answer by the 14th day of July, A. D. 1884, the petition of the said plaintiff this day filed against them in the clerk's office of said court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of June, A. D. 1884.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of June, A. D. 1884, and in the 108th year of the Independence of the United States of America.

Attest: [SEAL.] ELMER D. FRANK, *Clerk.*

I certify the above and foregoing to be a true copy of the original summons now in my hands.

——— ———,
U. S. Marshal.

——— ———,
Deputy U. S. Marshal.

(Return slip attached.)

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 16th day of June, 1884, I received this summons, and on the 16th day of June, 1884,
92 I served the same upon the within-named defendants, Harriet M. Leighton and Charles Leighton, in Lancaster county, State and district of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of abode of each of the said defendants, with an adult person and resident in the family of each of said defendants.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By A. G. HASTINGS,
Deputy United States Marshal.

Service	$4 00
Mileage	4 08
2 copies	60
Marshal's costs	$8 68

(Endorsed on return slip:) Filed Jun- 20, 1884. Elmer D. Frank clerk.

(Endorsements on summons:) No. 349, doc. H. United States circuit court, district of Nebraska. Rowena Young *vs.* Harriet M. Leighton *et al.*, summons. Amount claimed of the defendant by the plaintiff is possession of the tract or parcel of land in the southwest corner of the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, 6th p. m., containing 69 hundredths of an acre, more or less, and for costs of suit. Returned and filed June 20, 1884. Elmer D. Frank, clerk. Thurston & Hall, att'ys for pl'ff.

"EXHIBIT 4."

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendant, John C. Deputron, that he has been sued by Rowena Young in the circuit
93 court of the United States for the district of Nebraska, at Omaha, Nebraska; that, unless he answer by the 14th day of July, A. D. 1884, the petition of the plaintiff this day filed against him in the clerk's office of said court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of June, A. D. 1884.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of June, A. D. 1884, and

in the 108th year of the Independence of the United States of America.

Attest: [SEAL.] ELMER D. FRANK, *Clerk.*

I certify the above and foregoing to be a true copy of the original summons now in my hand.

——— ———,
U. S. Marshal,
By ——— ———,
Deputy U. S. Marshal.

(Return slip attached.)

DISTRICT OF NEBRASKA, *ss.:*

I hereby certify and return that on the 16th day of June, 1884, I received this summons, and on the 16th day of June, 1884, I served the same upon the within-named defendant, John C. Deputron, in Lancaster county, State and district of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of abode of the said defendant, with an adult person and resident in the family of said defendant.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By A. G. HASTINGS,
Deputy United States Marshal.

Service	$2 00
Mileage	4 08
Copy	30
Marshal's costs	$6 38

94 (Endorsements on return slip:) Filed Jun- 20, 1884. Elmer D. Frank, clerk.

(Endorsements on summons:) No. 348, doc. H. United States circuit court, district of Nebraska. Rowena Young *vs.* John C. Deputron. Summons. Amount claimed of the defendant by the plaintiff is possession of the W. ½ of northeast quarter of section 24, township 10, range 6 E., and costs of suit. Returned and filed June 20, 1884. Elmer D. Frank, clerk. F. P. Ireland and Thurston & Hall, att'ys for pl'ff.

Also, further to maintain the issues in this case, the defendant, offered in evidence the order of the court requiring the plaintiff to give security for cost as follows:

"EXHIBIT 7."

1884.
July 12.—Filed motion for security for costs.
Sept. 9.—Ent'd. Plaintiff required to give security for costs in 7 days or cause to stand dismissed.
16.—Ent'd. Time to give security for costs extended to Sept. 28 and cont'd.

Oct. 28.—Ent'd. Time to give security for costs extended to November 8.

Nov. 10.—Cause dismissed for failure to give security for costs. Dockets and cal'rs.

1885.

Jan. 7.—Ent'd. Cause reinstated, security having been given. Defendant excepts.

Jan. 7.—Rec'd of Jane Y. Irwin $166.66⅔—deposit on account of costs herein.

1884.

Sept. 9.— ROWENA YOUNG *vs.* HARRIET M. LEIGHTON *et al.* } No. 348, H.

Now comes the defendant herein, and, on his motion, plaintiff is ordered to give security for costs in 7 days or cause to stand dismissed.

In order further to maintain the issues in this case the defendant offers in evidence the following "exhibit:"

"EXHIBIT 8."

STATE OF OHIO, *Muskingum County,* } *ss:*

Depositions of witness taken to be used in the actions pending in the circuit court of the United States within and
95 for the district of Nebraska, wherein Rowena Young is plaintiff and The Lincoln Driving Park Association is defendant; also wherein Rowena Young is plaintiff and John C. Deputron is defendant; also wherein Rowena Young is plaintiff and Harriet Leighton and Charles Leighton are defendants. In pursuance of the notices hereto annexed, on the 10th day of November, 1888, at the residence of the witnesses, at the corner of Keene and River streets, at the time and place in said notices stated, the said Rowena Young appeared, by Joseph R. Webster, her attorney, and the defendants appeared by H. H. Wilson, their attorney; and thereupon the said plaintiff produced the following witnesses in order, to wit, WILLIAM P. YOUNG, who being first duly cautioned, solemnly sworn, and carefully examined, deposeth and says as follows:

Question. State your name, age, and place of residence and how related to the plaintiff, Rowena Young.

Answer. William P. Young; age, 76 years; residence, Zanesville, Ohio; am a brother of plaintiff, Rowena Young.

Q. Were you the executor of the estate of Ephraim Young, deceased?

A. I was.

Q. State what you know in respect to the financial ability of Rowena Young or of her having transmitted money or means to Jane Y. Irwin, of Nebraska City, Nebraska.

A. As far as I can answer, I know she (Rowena) has had money

out on interest ever since her father's death, 33 years ago next January, and even previous thereto. All I know about her having sent money to Jane is the talk I have heard in the family; have heard her and her sister Jane talk of it. It has been a matter of conversation and common understanding in the family.

96 Q. Do you know anything about the deed made by Jane Y. Irwin, June 11th, 1884, to Rowena Young of the forty acres of land near Lincoln, Nebraska, in controversy in this suit?

A. Don't know anything, except as heard between Rowena and Jane at Jane's visits, in 1883 or 1884 and 1887, and my sister Rowena's talk since.

Q. Was this talk at Jane's visit, in 1883 or 1884, prior to the making of the deed?

A. I think it was; that is my impression; am not certain.

Q. State what was the object or purpose of that deed as stated in the conversation between Rowena and Jane.

A. It was conveyed in consideration of sister Rowena's money, as I recollect.

Q. State what you know as to Jane's owing Rowena anything.

A. Knew before from what I had heard that Rowena's money had been used in the entry of this land.

Cross-examination:

Q. Are you the same William P. Young to whom this property in controversy, together with other lands, was conveyed by John and Jane Y. Irwin on August 10th, 1867?

A. Yes, sir; what land is land in controversy? I do not know—whether it is off of it or not. I got a deed about that time.

Q. This deed that you got covered the whole 120 acres originally patented to Jane Y. Irwin, did it not?

A. Yes, sir; but I could not say that it covered the whole of this land in controversy. I don't know where the land lay that is in controversy. The deed will show.

Q. Is it not a fact that at the time your sister Jane and her husband deeded this property to your—Seymour & Wardell, Nebraska, attorneys, had a suit pending concerning this property conveyed, and that after the conveyance was made you procured yourself

97 to be made a party to such suit, and thereafter procured said suit to be removed into the United States court, on the ground that you were the sole owner of the property and a non-resident of Nebraska?

Objected to by plaintiff's attorney as incompetent, all of the matters being of record.

A. I give my sisters a power of attorney and they employed lawyers, and they had it in court there. They was to defend the land and be to all expenses and give me a good title for the land. It went on and at one time the papers was stolen, so I understand (I was not there), and they beat them, as I understood, at every suit. Then, after that, they wrote to me that they could not get justice, and then I took it to the United States court.

Q. In all of that controversy with the lawyers your sister had entire control and management for you, did she not?

Objected to by plaintiff's attorney for the reason of incompetency and immateriality.

A. Yes, sir; I gave her a power of attorney, as I was not there.

Q. You say that the Irwins agreed to make you a perfect title to the 120 acres conveyed to you, and that in pursuance of such agreement they carried on the litigation between the Irwins and the Nebraska Youngs, as well as that of the attorneys against yourself?

A. I don't understand it and never understood it in that way.

Q. Why, then, were they interested in carrying on the litigation after they had conveyed the property to you in 1867?

Objected to because it assumes a fact not shown and as incompetent and immaterial.

98 A. Well, they were to give me a clear title, and I suppose that is the reason. I do not know of any other.

Q. They also, for the same reason, defended in your name against the claim of the attorneys, did they not?

A. Indeed, I don't know, sir; that is the first I ever heard of that.

Q. Is it not a fact that the Irwins managed in your name the defense of the case brought by Seymour & Wardwell against you for attorneys' fees?

A. Never, as I recollect of.

Q. Who did manage it for you in Nebraska?

A. I never considered that I had a lawsuit in Nebraska, as Mr. Seymour and Wardwell were employed before I gave the power of attorney, and they said they could not carry it on without I gave my sister a power of attorney.

Q. Then your view of it was that the suit between the Irwins and John Young, of Nebraska, having been commenced before you got the titles, and the Irwins having agreed to make the title perfect, the Irwins and not you should have paid the costs and attorneys' fees?

A. I don't understand it; don't think the suit was commenced before I got the deed; I feel positive of that.

Q. Then it is not a fact that this 120 acres of land was originally entered on a land warrant?

A. I don't know, sir.

Q. To whom was this land warrant given by the Government?

A. I don't recollect.

Q. All you know touching the entry of this land and the warrant with which it was bought you learned from your sister, did you not?

99 A. I don't recollect and can't answer.

Q. The title to this property never having been made good by the Irwins, I suppose you never paid the $490 stated in the deed, did you?

A. It was paid when I got the deed.

Q. How did it come that you reconveyed this to your sister Jane in July, 1874?

A. Because I got my money back and a little more, and it was not doing me any good and was never likely to the way it was fixed.

Q. Haven't you ever seen the property in controversy or ever been in Nebraska?

A. No, sir; never was out of Ohio.

Q. Then you bought this land and paid for it solely on the representations of your sister, and reconveyed it to her after seven years for ten dollars more than you paid?

A. I don't recollect what I did get; it was more than I paid. I thought I would let her have it and fight it out if she wanted to.

W. P. YOUNG.

"EXHIBIT 9."

Rowena Young.

Q. State your name, age, residence, and whether you are the plaintiff in these actions.

A. Rowena Young; age, about seventy (70) years; residence, Zanesville, Ohio; am the plaintiff.

Q. State whether or not there was any agreement or understanding that the deed of the land in controversy made to you June 10th, 1884, by Jane Y. Irwin was not to be absolute or to your sole interest.

A. It was to my sole interest.

100 Q. Who is the real owner of the land or the interest in it conveyed to you by that deed?

A. I am.

Q. State for what reason or how the land came to be conveyed to you.

A. I had been advancing her money and had a share in it besides myself, and the land I took to pay for what she owed me.

Q. You say you had a share in it yourself. Please state how that arose.

A. The land was entered with money coming out of my father's estate, belonging in part to me, being the joint fund of Jane and myself.

Q. Since this suit commenced have there been strangers here to talk with you on this matter? If so, state who they claimed to be, when they were here, what they said, and state fully all that was said by them and you.

A. The first one that came (I don't know who he was) said he came over from Spanglers & Finley's. He wanted to trade some property in Zanesville for land in Nebraska. I told him that we did not want to trade the land for any more property, for we had more here than paid well. Then he wanted to know what I valued the land at, and I told him $75,000, and he said that was most too high; said he did not calculate to go higher than four or five thousand. Then he said he was going there and would like to have some of the land very much, and I said that perhaps if he went to my attorney

he could get some of that other land, and that was all that was said, and then he went out. There was one other who came. He claimed to come from Penn.; was here in the morning and talked to my brother. He came in the evening and saw me. There was a good deal said. He wanted to know how I had come by that land.
101 I told him I had always had an interest in it since it was bought, and he said he had come here to buy property, but he believed he would go West and see if he couldn't do better, and he would go, and if he could not suit himself he would come back and see if he could not make a bargain with us, and I told him he need not do that because we would not sell. I can't remember anything else, for he talked too much to me. I never had an idea that he was one of them from out there.

Q. Did this man give you his name or have you seen him since, and do you know who he was?

A. I cannot recollect his name. I might to have found out by some of them he had subpœnaed, but I did not want to gratify him that much, for they knew nothing about me.

Cross-examination:

Q. In what year were you born, Miss Young?
A. In 1818 or 1819.
Q. In what month?
A. February 2nd.
Q. Where were you born?
A. In Muskingum county, Ohio.
Q. How far from Zanesville?
A. Right here.
Q. What was your father's name?
A. Ephraim Young.
Q. About what time did he die?
A. He died in 1856, in January.
Q. What property did your father own at the time of his death?
A. Well, he owned these two big lots and three houses on them and fifty acres of land, and then he had some money, but I don't just know how much, and had right smart coming.

Q. Your father left a will, did he not, and his property was
102 distributed according to the terms of that will, was it not?

A. Yes, sir; he left a will; yes, sir; the property was so distributed.

Q. Up to the time of your father's death you had always resided with him and lived as one of his family, did you not?
A. Yes, sir; I did.
Q. What amount of money or property did you have of your own at any time prior to your father's death?
A. Well, I had money but I did not have any real estate while he was alive.
Q. How much money had you on hand or loaned out at the time of his death?
A. I guess I had about one thousand dollars.
Q. Where was it at that time?

A. Well, it was out with some good men who lived in the country, at interest, generally at ten per cent.

Q. Give the names of the men who had it at that time.

A. Well, Mr. Welch and Mr. Miller.

Q. How much did Mr. Welch have?

A. I guess he had about five hundred dollars.

Q. What is Mr. Welch's first name and where did he then live?

A. John Welch, and lived up in the country, in Muskingum township. He is still living up there.

Q. Was this loan secured by a mortgage given by Welch on his real estate?

A. No; I don't know whether there was security or whether some men went in with him.

Q. About what is the age of Mr. Welch?

A. I don't know; his family have all grown up.

Q. Is he the only John Welch in Muskingum township?

A. I think not.

Q. What is the name of the wife of this one you refer to?

103 A. I do not know.

Q. What was Miller's first name, and how much of your money did he have?

A. John. I guess he had three hundred dollars.

Q. How was that secured?

A. I guess I just had a bond.

Q. Where does he live?

A. He lives up the river, six or eight miles from here.

Q. For how long were these loans made to Welch and Miller?

A. I cannot tell; I have no papers now.

Q. Where did you get the $1,000 which you had at the death of your father?

A. Well, that is a pretty question. I got it honest. My father gave it to me from time to time, and I had always been saving.

Q. You have kept this money out at interest all the time by re-loaning it whenever it was paid in, have you not?

A. Yes, sir.

Q. You say you are not able to get as much interest as you could a few years ago?

A. No, sir; I can't get as much.

Q. Have you always drawn these notes, bonds, and securities yourself and kept these papers yourself?

A. No, sir; my brother has done it for me.

Q. You are able to write, are you not?

A. I cannot write much. Before I got through school I had the rheumatic fever; that *it* crippled me up so I can't write much.

Q. Do you usually sign your own name?

A. Yes, sir.

Q. Do you know about what year this property in contro-

104 versy was obtained from the Government?

A. I guess it was in sixty some; I forget.

Q. In whose name was it originally entered?

A. I think in my sister's and brother's. I think that is the way.
Q. Was your brother out to Nebraska at that time?
A. No, sir.
Q. To which brother do you refer?
A. Brother William, who is here.
Q. Was John Young, who was in the sixties in Nebraska, your brother?
A. No, sir. I never had a brother John.
Q. What relation was John to you?
A. I don't know whether he was any.
Q. Do you not know that this land was originally entered and paid for by a land warrant?
A. No; I don't.
Q. How was the Government paid for this land originally?
A. It was entered like any Government land, paid for in money and receipts got.
Q. Who paid the money, and how much was paid?
A. It was my sister or her husband. They had the money there and paid for it. They had five or six hundred dollars.
Q. What do you know about the litigation or lawsuit between the Irwins and the Youngs, in Nebraska, touching the ownership of this property?

Objected to by plaintiff's attorney as incompetent.

A. Well, I knew they had a lawsuit, and they thought that Young ought not to have it; that he was not owner of it.
Q. Do you remember of some lawsuits between the Irwins and their attorneys concerning their fees for recovering this property?

105 Objected to by plaintiff's attorney as incompetent and cross-examination.

A. I heard something about it; I don't know, but I guess they got it all—the attorneys—did not they?
Q. What do you know about the Irwins conveying all this property to your brother William about the time of these lawsuits with the attorneys and while these suits were pending?

Objected to — pl'ff's attorney because it is not cross-examination and incompetent.

A. I don't know anything about it.
Q. Did you ever know that your brother William claimed to own this property at any time or claimed an interest in it?

Objected to same as above.

A. He always claimed an interest in it.
Q. Then you never knew of him claiming to be the sole owner of this property in controversy?
A. Well, I don't know but he might from what I know.
Q. Did he ever claim to you that he ever owned the whole of it?
A. No; he never claimed the whole of it, but he expected to get a good deal out of it, but I don't know as he ever did.

Q. Since the death of your father up to the present time you have continuously resided with your brother and his family, and in this house, have you not?

A. Yes, sir.

Q. Did you ever own a farm in this county or anywhere else at any time?

A. Yes; I owned some land.

Q. Where?

A. Falls township, Muskingum county, Ohio.

Q. How many acres?

106 A. Don't know just how many—five or six.

Q. That is the farm your father owned at the time of his death, and it has never been divided among the heirs, has it?

A. Not all of it—well, the heirs have all been bought out except two.

Q. Who now owns it?

A. Myself, Brother William, and Mrs. Irwin.

Q. You, then, have never sold your interest in any of the real estate inherited by you from your father?

A. No, sir; I have not sold a bit.

Q. Mrs. Jane Y. Irwin, of Nebraska City, is a younger sister of yours, is she not?

A. Yes, sir; she is about three years younger than I am.

Q. She went to Nebraska soon after her marriage and has always lived there since, has she not?

A. Yes, sir; she has lived there since 1858.

Q. During all this time have you ever personally written a letter to her?

A. No, sir; not myself; for I never write letters.

Q. Your brother has during all these years had entire charge of all your business matters and has conducted all the correspondence with your sister, as well as others, had he not?

A. Yes, sir.

Q. Who has, during all this time, had possession of your notes, bonds, deeds, and such like valuable papers?

A. Why, he has always had the care of them.

Q. Then any money of yours sent to Nebraska during this time was sent by him, was it not?

A. Yes, sir.

Q. Then I suppose you, of course, have no personal rec-

107 ollection as to the time any moneys were sent her or the amounts?

A. No; I haven't.

Q. Your sister, Mrs. Irwin, was here in 1883 and again in 1887 on business connected with this property in controversy, was she not?

A. Yes.

Q. Was her visit in 1888 caused by your report to her that some men had called on you here concerning this property in controversy?

A. No, sir; she got the news from some place else.

Q. Do you know how she obtained the news?

A. No, sir; I did not ask her. I believe——

Q. She told you, did she?

A. She told me and did not like it because I had not told her, but I did not know that they were from there—had no idea they were from there.

Q. What did she then say about your having talked to these men?

A. Well, when I told her as near as I could what had been said, she said, after a while, that she did not know as it would make much difference, as I had not given an affidavit, and I told her I would be smart to give an affidavit when I did not know where they were from nor anything about them.

Q. What advice or caution did Mrs. Irwin give you at that time about talking any more about it?

A. She cautioned me not to talk any more about it, and so I have not.

Q. Miss Young, have you ever in any way mortgaged or in anywise incumbered this real estate you inherited from your father?

108 A. I never have.

Q. Have you ever borrowed any money from any one since your father's death?

Objected to by plaintiff's attorney as immaterial.

A. No, sir; I never did.

Q. You have never sent any money to Nebraska to pay or secure the costs in these cases, have you?

Objected to by plaintiff's attorney as immaterial.

A. Sent some last winter for that.

Q. How much?

A. Oh, I ain't going to tell you how much.

Q. In what way did you send it?

A. Sometimes expressed it and sometimes sent it in a letter.

Q. Which way was it done last winter?

A. I gave it to my sister, Mrs. Irwin, when she was here.

Q. About what time last winter was your sister here?

A. She was here in February, and I can't just remember what time. She started away in February.

Q. Your memory has failed a good deal in the last few years, has it not?

A. Yes, sir; it has. I have been troubled with my spine some, and it has affected my head some at times.

Q. You never have claimed all this land in controversy, but merely that you are interested in it as well as Mrs. Irwin?

Objected to by plaintiff's attorney as assuming a statement contrary to that made by this witness, and intended to entrap and mislead her.

A. I count that I have got her share out. I paid for it; her claim in it.

Re-examination:

Q. Before your father's death this place had been kept as a hotel?
A. Yes, sir; and for 25 years after father's death my brother and I kept it as a hotel.

ROWENA YOUNG.

"EXHIBIT 10."

Mrs. Harriet L. Young.

Q. State your name and place of residence and relationship to plaintiff.
A. Harriet L. Young; residence, Zanesville, Ohio, and wife of William Young.
Q. If you have any knowledge of the intent and purpose of the deed made June 11th, 1884, by Jane Irwin to the plaintiff, of the land in controversy, state what you know about it.

Objected to by defendant's attorney as incompetent, immaterial, and irrelevant.

A. I don't know much about it, only what Miss Young told me, that what money she had was in land out West.

Defendant moves to strike out answer as not responsive.

Q. Were you present at a conversation between Rowena Young, plaintiff, and strangers, referred to by her? If so, state who the men were or claimed to be, and what was said by her or them in regard to the land.

Defendant objects; same reason as above.

A. Yes, I was present; man said he came from Penn., and was looking around to buy some property, and thought he would like to locate out West. He asked Miss Young if she would like to sell her property or trade for property here, and she told him
110 no; had more property here now than paid them to keep. He wished to know how old she was, if she did not think the land out here was outlawed, and she told him no. He asked what she valued the land at. She told him it was appraised at seventy-five thousand dollars. He thought that was a pretty high price and did not think he would be able to give more than four or five thousand. The rest of the conversation I did not hear, as I was called out.

Cross-examination:

Q. In what year were you married to the witness, William P. Young?
A. In March, 1884?
Q. How long before your marriage had you been acquainted with Rowena Young, the plaintiff?
A. I was not acquainted with her before I was married.
Q. How many times has Mrs. J. Y. Irwin been here since you came into the family, and when?

A. Twice she has been here. First time, fall of 1884—first fall after my marriage; second time was this last winter.

Q. Then all you know concerning the land in controversy is what the plaintiff told you from time to time?

A. I do not know anything except what plaintiff told me.

HARRIET L. YOUNG.

Warranty Deed. John Irwin to William P. Young.

Deed Rec. A, page 135.

Filed for record Aug. 10th, A. D. 1867, at 7 o'clock a. m. S. B. Caley, Co. clerk.

For the consideration of four hundred and ninety dollars in hand paid by William P. Young, of Muskingum county, in the
111 State of Ohio, the receipt of which is hereby acknowledged, Jane Y. Irwin and John Irwin, of Otoe county, in the State of Nebraska, do hereby grant, bargain, sell, and convey to the said William P. Young and to his heirs and assigns forever the following-described lot, tract, and parcel of land, to wit: The southwest quarter of the southwest quarter and the north half of the southwest quarter of section twenty-four, in township ten, range six east, S. W. ¼ of the S. W. ¼ & N. ½ S. W. ¼ of sec. 24, township 10 N., of R. 6 E., in the district of lands subject to sale at Nebraska City, Nebraska, containing one hundred and twenty acres, together with all the rights, privileges, and appurtenances thereto belonging or pertaining thereto; and we do covenant and agree that — the delivery hereof we are the lawful owners of the premises above granted, seized of a good and perfect title thereto, clear of all incumbrances whatever, and that they [we] will warrant and defend the aforegranted premises unto the said William P. Young, his heirs and assigns forever, against all persons claiming a legal right thereto; and I, Jane Y. Irwin, wife of John Irwin, do hereby relinquish and release all my right of dower in and to the above-bargained premises.

In witness whereof we have hereunto set our hands and seals, at Nebraska City, Nebraska State, this the 9th day of August, A. D. 1867.

JOHN IRWIN. [SEAL.]
JANE Y. IRWIN. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. W. WARDELL,
SAMUEL B. IRWIN.

[U. S. rev. stamp, 50 cts.]

STATE OF NEBRASKA, }
County of Otoe, } *ss:*

Personally appeared before me, W. W. Wardell, notary public within and for said county, the above-named Jane Y. Irwin
112 and John Irwin, grantors, to me personally known to be the identical persons who executed the foregoing instrument as

grantors, and acknowledged that they executed the same as their voluntary act and deed.

In witness whereof I have hereunto set my hand and notarial seal, at Nebraska City, N. T., this ninth day of August, A. D. 1867.

[L. S.] WILLIAM W. WARDELL,
Notary Public.

STATE OF NEBRASKA, } ss:
Lancaster County, }

We, the undersigned, abstracters in and for Lancaster county, Nebraska, *I* do hereby certify that the above and foregoing is a full, true, and complete copy of a certain instrument in writing of record in office of register of deeds of said county in Deed Record "A," at page 135, & following.

Witness our hands, at Lincoln, Nebr., on this 24th day of December, A. D; 1888.

ZERUECKE & HATCH, *Abstracters.*
T. H. HATCH, *Examiner.*

"EXHIBIT 12."

Quitclaim Deed from W. P. Young to Jane Y. Irwin.

Filed for record July 11, 1874, at 8 o'clock a. m. R. O. Phillips, Co. clerk, by J. P. Hebard, deputy. Record O, — 424.

Know all men by these presents that I, William P. Young, of the city of Zanesville, in the county of Muskingum and State of
113 Ohio, in consideration of five hundred dollars to me paid by Jane Y. Irwin, of Nebraska City, State of Nebraska, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quit claim to the said Jane Y. Irwin, her heirs and assigns forever, the southwest quarter of the southwest quarter and the north half of the southwest quarter of section twenty-four, in township ten north, of range six east, in the district of lands subject to sale at Nebraska City, Nebraska, containing one hundred and twenty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyors general, and all the estate, right, title, and interest of the said William P. Young, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the only proper use of the said Jane Y. Irwin, her heirs and assigns forever.

In testimony whereof the said Willian P. Young has hereunto set his hand and seal on this fifth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

WILLIAM P. YOUNG. [SEAL.]

Signed, sealed, acknowledged, and delivered in presence of us—
JOS. S. PARKE.
FENTON BAGLEY.

STATE OF OHIO, } ss:
Muskingum County, }

Be it remembered that on the fifth day of February, in the year of our Lord one thousand eight hundred and seventy-four, before me, Joseph S. Parke, an acting justice of the peace within and for said county, personally came William P. Young, the grantor in the above deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

114 In testimony whereof I have hereunto subscribed my name officially on the day and year aforesaid.

JOS. S. PARKE,
Justice of the Peace.

THE STATE OF OHIO, } ss:
Muskingum County, }

I, the undersigned, clerk of the court of common pleas within and for the county aforesaid, do hereby certify that the before-named Joseph S. Parke, Esq., was at the time of attesting the foregoing certificate an acting justice of the peace within and for the said county, duly authorized and qualified as such, and that his signature aforesaid is genuine, and that he is duly authorized by the laws of the State of Ohio to execute such attestation and to take and certify acknowledgments of deeds.

Witness the clerk and seal of said court, at Zanesville, this 5th day of February, A. D. 1874.

[SEAL.] EDGAR W. ALLEN,
Clerk of said Court,
By —— ——, *Deputy Clerk.*

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, J. H. McClay, county clerk of said county, hereby certify that the above and foregoing is a true and correct copy of a deed as appears of record in this office in Deed Record "O," at page 424, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 23rd day of June, A. D. 1884.

J. H. McCLAY,
County Clerk,
[SEAL.] By F. McCLUSKY, *Dep.*

115 "EXHIBIT 13."

And to further maintain the issues in this cause the defendant read in evidence the deposition of Jane Y. Irwin as follows:

JANE Y. IRWIN, of lawful age, who, first being duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Int. 1. State your name, age, and place of residence.

Ans. Jane Y. Irwin; age, fifty-nine; place of residence, Nebraska City.

Int. 2. Are you Mrs. Jane Y. Irwin who was formerly owner of the N. E. ¼ S. W. ¼, sec. 24, t'p. 10, R. 6 E., in Lancaster Co., Neb.?

Ans. Yes, sir.

Int. 3. State what you know in reference to a power of attorney which is claimed to have been executed by yourself & husband to one Wm. T. Donavan about the 12th of August, 1875.

Ans. I have no recollection whatever of signing any power of attorney to Wm. P. Donavan or any other person. I was called on a great many times to execute papers in that case, and they were not read to me, saying they were necessary to have in that case, and knew nothing of the contents whatever, & have no recollection of talking to Wm. P. Donavan about a power of attorney at any time, and if such a thing exists it was got fraudulently.

Int. 4. The case you refer to as "that case" was the suit of Seymour & Wardell *vs.* Young, was it not?

(Question objected to as leading.)

Ans. Yes, sir.

Int. 5. And when you say you were called upon to sign papers to whom do you refer?

116 Ans. I refer to those who had the contract to sell the land for my brother at that time.

Int. 6. Scott, Boyd and La Master?

Ans. Yes, sir.

Int. 7. State whether or not there was any proposal to you or any intention on your part to authorize Wm. P. Donavan to sell or make contracts to sell these lands at that time.

(Int. objected to as leading.)

Ans. 8. I have no recollection of ever, for the simple reason that we had leased it to Scott, Boyd and La Master for five years, and we had no contract over it; don't know as you would call it a lease; it was a contract.

Int. 9. If there had been any such talk that you should give Donivan any such authority & power or any intention on your part to do so would you remember it at this time?

Ans. I certainly think I should have remembered it. I have no recollection of it whatever.

Int. 10. Were you at that time acquainted with J. P. Lantry?

Ans. No; I never saw him but once, and then I was boarding at Scott's, and Mrs. Douglass came into Donivan's, and they gave a dinner and invited me down, and I met with Mr. Lantry and his wife for a few hours, and that was the only time I ever saw them, as I recollect.

Int. 11. Have you ever seen such a power of attorney since that time or has it ever been shown to you?

Ans. I have never seen any power of attorney nor pretended power of att'y of any description whatever, knowing that it was a

power of attorney, only the one I received from my brother William.

Int. 12. When did you first hear that they claim that there was such?

117 Ans. Not until a friend wrote to me that Wm. Donavan was transferring some of the lands, and I couldn't think it possible that he had any authority, & if he had it was obtained fraudulently.

Int. 13. And what did you do when you heard of that?

Ans. I got Mr. Irwin to go up and cancel it.

Int. 14. State whether or not Mr. Donavan ever made report to you of any sales or asked your approval of any sales of any part of the property.

Ans. No, sir; he never did.

Int. 15. State whether or not he ever remitted to you or accounted to you for the proceeds of any sales of any part of the property he claimed to have made.

Ans. No, sir; he never did. I hadn't heard from Donavan for a long time before those sales were made, and never have heard from him since.

Cross-examination:

Int. 1. You don't know for certain, Mrs. Irwin, that you never signed a power of att'y to Donavan?

Ans. I never did it knowingly that I signed one.

Int. 2. You signed a good many papers about that time, did you not, of one sort or another?

Ans. I signed several papers about that time in the case and did not know what they were; they were not read to me.

Int. 3. You usually signed papers about that time without having them read to you, did you, Mrs. Irwin?

Ans. Not very many.

Int. 4. Was any one present when you signed these papers that you didn't read?

118 Ans. Of course the ones were present that presented them to me.

Int. 5. Did you sign these papers that you say you didn't read without asking any explanation of the contents?

Ans. I asked the explanation, but they said they were all right, and was needed in our contract with Scott, Boyd and La Master. Of course I had confidence in them, and thought they would do only what was just & right.

Int. 6. To whom do you refer when you say "they told me?"

Ans. Scott, Boyd and Lamaster were all the persons I had dealings with at that time.

Redirect ex.:

Int. 1. You say you did not sign many papers unless they were read to you. Answer anything farther that you would wish in regard to that matter.

Ans. I had reference to Scott, Boyd and Lamaster, and in con-

tract with them I reserved the right to execute all deeds myself, and if I should have given any authority it would have been to one of them. I had but slight acquaintance with Donavan.

(That part of the answer relating to contents of contract objected to as not the best evidence.)

JANE Y. IRWIN.

Subscribed in my presence and sworn to before me this 18th day of Feb'y, 1886.

[SEAL.] H. M. BOYDSTON,
Notary Public.

EXHIBIT 14TH.

Also, further to maintain the issues in this case, the defendant offered in evidence the deposition of William T. Donovan as follows:

119 Depositions of sundry witnesses taken before me, Karl A. Snyder, a duly appointed, qualified, and acting notary public within and for the county of Bernalillo, in the Territory of New Mexico, on the fifteenth day of January, in the year 1886, between the hours of nine a. m. and six p. m., at the law office of William C. Hazeldine, in the city of Albuquerque, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the defendant in an action pending in the circuit court of the U. S., district of Nebraska, in which Rowena Young is plaintiff and The Lincoln Driving Park Association is defendant.

WILLIAM T. DONOVAN, of lawful age, being by me first duly examined and cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows, viz:

My name is William T. Donovan; age, 66 years, and I reside in Albuquerque, New Mexico.

I resided in Lincoln, Nebraska, from 1867 to 1881.

My business in Lincoln, Nebraska, from 1875 to 1879 was that of a real estate agent. During the time I was engaged in the real estate business in Lincoln I was acquainted with Jane Y. Irwin and John Irwin. Between the years 1875 and 1879 I was well acquainted with the property known as the west half of the southwest quarter and the northeast quarter of the southwest quarter of section No. twenty-four, town. ten, range six east, Lancaster county, Nebraska, which was owned at that time by Jane Y. Irwin, subject to tax liens and the attachment held by [on] it by Wardell, Little, *et al.*

Prior to the month of August, 1875, Jane Y. Irwin and her husband placed this property in my hands as a real estate agent to sell the same or their interest therein.

120 Jane Y. Irwin and her husband left this property in my hands to sell until I sold the same.

The said Irwins, in connection with placing this property in my hands for sale, gave me a power of attorney to make conveyance of

the same in case I should make any sale, which power of attorney was dated August 12th, 1875, and recorded in the office of the clerk of Lancaster county, Nebraska. I do not remember the date of recording it.

I conveyed to S. W. Little and others portions of that property under said power; but as to conveying to J. P. Lantz, I do not remember conveying any of that property to him or of selling him any portion thereof.

Before obtaining the power of attorney to sell I made arrangements to sell to E. E. Brown, Mr. Hallow, N. C. Brock, and others the Irwin interest in the property; but Irwin was not willing to make deed at the price agreed upon, to wit, forty thousand dollars, and the sale fell through.

I afterwards and before I got the power of attorney made arrangements with S. W. Little to settle his tax title, but Irwin refused to agree to it.

While this power of attorney was still in force I was convinced that the Irwins' title to the property was null and void, and that they had no title; but, to gratify Mr. Little and others, I made a deed under that power to forever quiet their titles.

Not knowing what lots are in litigation, I cannot say whether my deeds covered that or not.

WILLIAM T. DONOVAN.

I, Karl A. Snyder, a duly appointed, qualified, and acting notary public in and for the county of Bernalillo, in the Territory of New Mexico, do hereby certify that William T. Donovan was by
121 me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, were [was] reduced to writing by myself in the presence of said witness, and were [was] subscribed by the said witness in my presence, and were [was] taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at Albuquerque, N. M., on this 16th day of January, A. D. 1886.

[SEAL.] KARL A. SNYDER,
Notary Public.

Fees paid by def't:

Notary public	$5 00
Witness	2 00
	$7 00

Notice to take deposition omitted.

Endorsed: No. 350, H. Notice to take depositions. Rowena Young *vs.* The Lincoln Driving Park Association. In the U. S. court, district of Nebraska. Rec'd and filed Jan'y 19, '86, and

opened, by request of pl'ff's att'y, Jan. 20, '86. Elmer D. Frank, clerk.

122 "EXHIBIT 15."

And, to further maintain the issues in this case, the defendant introduced the second and third special findings of the jury in this case, which are as follows:

2nd. On the 31st of March, 1874, Jane Y. Irwin and husband entered into a contract with N. S. Scott, Samuel Boyd, and Milton La Master for the selling and subversion of said lands.

3rd. And said Scott, Boyd, and La Master soon after entered upon said lands under said contract and staked out the block corners and street intersections, being engaged in the survey of the lands in controversy and other lands for a period of about two months, furnishing their survey about the last of May, 1874.

"EXHIBIT 16."

Plaintiff next produced JOHN IRWIN, of lawful age, —, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Int. 1. State your name, age, and place of residence.

A. My name is John Irwin; in the eighty-sixth year of my age, and residence in Nebraska City.

Int. 2. You are the husband of Mrs. Jane Y. Irwin, who has just testified, and was in August, 1875?

Ans. I am.

Int. 3. State what you know in reference to a power of attorney which is claimed to have been executed by Mrs. Jane Y. Irwin and yourself to Wm. T. Donovan, of Lancaster county, Nebraska, in August, 1875.

Ans. I have no knowledge, to the best of my recollection, of any such power of attorney being given by Mrs. Irwin and myself. If the records show such power of attorney I verily believe that it was a forgery or obtained by false pretenses.

123 Int. 4. State whether or not there was any proposal that you and Mrs. Irwin should give such power of attorney to Donovan or any intention or consent on your part to give a power of attorney to him to sell or contract to sell any of the land in controversy.

A. I don't recollect of any such proposition being made or of giving Donovan power to sell and deed any of those lands.

Int. 5. If there had been any such talk or negotiation for the giving of such a power to Donovan would you remember it at this time?

Ans. It's been so long since that I cannot say positively yes or no

Int. 6. Were you acquainted at that time with William F. Donovan?

Ans. The first recollection I have was when he came up to the court-room in Lincoln and seemed to sympathize with Mrs. Irwin,

saying that he looked upon it as a wilful robbery and perjury of Seymour & Wardell to take an appeal against their client and go into court and swear that their services were worth $75,000.00, and attach the property for that amount, claiming ten thousand dollars additional to bribe the court, which claim they kept up for six years, when the entire amount at issue was only $113.10, that being the amount that John M. Young agreed to pay to Mrs. Irwin for said property, but failed to do so. This was about the time that Mrs. Irwin gave the contract to Scott, Boyd, and La Master; somewhat near.

(Answer objected to as irresponsive.)

Int 7. During the year 1874 and 1875 were you anyways intimately acquainted with Mr. Donovan, or did you repose any especial confidence in him?

124 Ans. Not that I recollect of.

Int. 8. Have you ever seen such a power of attorney since 1875, or has it been shown to you?

Ans. Never seen that pretended power of attorney, that I know of.

Int. 9. When did you first hear it claimed or pretended that you and Mrs. Irwin had given Mr. Donovan such a power?

Ans. An attorney wrote down to Mrs. Irwin and I stating that Donovan was conveying or about to convey to his partner (I think his name was J. P. Lantz) a portion of that property under that printed power of attorney.

Contents of letter objected to as not being the best evidence.

Int. 10. About when was that?

Ans. I don't recollect.

Int. 11. What did you do then?

Ans. I went up to Lincoln, at the request of Mrs. Irwin, and cancelled that pretended power of attorney (annulled it, rather), and gathered up other papers which she had signed without knowing the contents. I think one was in the hands of Haller, who owned the opera house. Mrs. Irwin, when I came home, was perfectly astonished to hear that such papers were in existence without her knowing the contents, they never having been read to her, or, if read at all, read falsely.

Int. 12. How soon after you got this information that Donovan pretended to have a power was it that you went to Lincoln and attended to the annulling of that pretended instrument and others?

Ans. As soon as I could make it convenient to go up; within eight or ten days, perhaps.

125 Int. 13. State whether or not Mr. Donovan ever made report of any sales or asked approval of any sales of any part of the property.

A. I don't recollect that Mr. Donovan ever told me that he had any such instrument. I know he never made any report, that I recollect of.

Int. 14. State whether or not he ever remitted any money or

accounted for any money or property as the proceeds of pretended sale of any portion of this property.

A. He never did; neither money, valuables, or any other consideration whatever.

Cross-examination:

Int. 1. Did not either Mr. Scott, Boyd, or La Master talk with you and Mrs. Irwin in relation to the giving of this power of attorney to Donovan?

Ans. Not that I recollect of.

Int. 2. Did not one or the other of them state for what purpose the power of attorney to Donovan was to be given?

Ans. I don't recollect anything about it.

Int. 3. They may have talked to you, then, in regard to this power of attorney to Donovan and you may have signed the same?

Ans. It's so long that I have forgotten the facts.

Redirect ex.:

Int. 1. Are you acquainted with J. P. Lantz; and, if so, when and under what circumstances did you become acquainted?

A. I don't recollect the date, but the first time I became acquainted with Lantz I was passing along the street and Mr. Donovan hailed me and asked me if I would go into his partner's office. He
126 stated that Lantz and he were in partnership in the land business. I went in and stopped a few minutes. Mr. Lantz said it was a convenient office and wished me to call again and see him. I told him I would and left. I don't recollect whether I called again or not.

JOHN IRWIN.

Subscribed in my presence and sworn to before me this 18th day of Feb'y, 1886.

H. M. BOYDSTON,
Notary Public.

"EXHIBIT 17."

And, to further maintain the issues in this cause, the defendant read in evidence the deposition of Elizabeth Young as follows:

ELIZABETH YOUNG, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Question one. State your full name, age, and place of residence.

Ans. Elizabeth Young; sixty-three years of age; my place of residence is the 8th ward of the city of Zanesville, Ohio.

Q. Are you personally acquainted with Rowena Young, the plaintiff in this case?

Ans. Yes, sir; I am.

Q. Where does Rowena Young now live and how long has she resided there?

Ans. She lives in the 8th ward of the city of Zanesville, Ohio, on River street, at the corner of Keen. She lives with her brother. I have been connected with the family forty-one years, and she had lived there that long.

Ques. In what way are you connected with her family?

Ans. By marriage. My husband, who is now dead, was a brother of hers.

127 Ques. How long have you resided at your present residence on River street?

Ans. Forty-one years.

Ques. About what is the distance from your residence to that of Rowena Young?

Ans. Half a square.

Ques. Of how many children did the Young family consist and what are their names?

Ans. Mary Helmick, William Young, my husband, Zenas F. Young; Rowena Young, Jane Young, now Irwin; Martha Young, Georgiana Young, now Wimmer; Josephine Young, now Thurber.

Q. About what is the present age of Rowena?

Ans. I can't tell exactly her age.

Ques. Was she a woman grown when you were married forty-one years ago?

A. Yes, sir; she was.

Q. Has Rowena ever been married?

A. No, sir; she has not.

Q. What was the name of Rowena's father and when did he die? State as nearly as you can.

Ans. Ephraim Young; he died about thirty years ago, as nearly as I can recollect.

Q. After the death of Mr. Young of whom did the family then at home consist?

Ans. Mrs. Irwin was at home at that time and Mrs. Thurber and Martha and Rowena and William.

Q. Did the mother of this family die before or after the death of the father?

Ans. About fifteen years after the death of the father she died, I think.

Q. When did Mrs. Thurber marry and leave the home?

Ans. I think it was about the year after her father's death

128 that she married her first husband. She was married twice.

Q. About what time did Mrs. Irwin marry and leave the old home?

Ans. Well, as nearly as I can recollect, it was four years, about, after her father's death.

Q. Then for the last fifteen years the family consisted of the brother, William Young, and his two sisters, Rowena and Martha, up to the time of Martha's death, did it not?

Ans. Yes, sir; it did.

Q. Was Martha ever married?

Ans. No, sir; she was not.

Q. Who kept house and had charge of the home after the death of the mother?

Ans. Rowena and Martha and their brother. They remained at home and kept the house.

Q. About when was William married?

Ans. Four years ago this spring.

Q. Does Rowena still continue to reside with her brother since his marriage?

Ans. Yes, sir; she does.

Q. What is the condition of Rowena's health and physical strength?

Ans. Her health is very poor; she is very feeble.

Q. How long has she been in ill-health and feeble?

Ans. She has been in ill-health ever since I knew her, but of course she has grown much worse, and the last few years has been very feeble.

Q. During all these forty years have you been on friendly terms with Rowena, and have you visited back and forth?

A. Yes, sir.

Q. What property, if any, was left by the father and mother of this family at their death?

129 Ans. Well, so far as I know, I know she has an interest with the rest of the heirs in the property on the corner of Keen and River streets. Then Mr. Young left a piece of land, I think, of fifty acres. I can't say for certain, but I think that Rowena did not get any share of that land.

Q. Did you ever know of Rowena Young owning any other real estate except the interests she inherited from her father's estate?

Ans. I do not.

Q. Do you know of her ever having sold to any one any part of her interest so inherited?

A. I don't.

Q. Has Rowena at any time during your acquaintance with her been engaged in any other business or occupation or trade except that of housekeeper in the old home?

Ans. I don't know of any.

Q. Have you ever known of her buying and selling property—investing money in speculation of any kind whatever?

Ans. No, sir; I have not.

Q. For the last five or six years what has been her physical condition and how much of this time has she been confined to her home?

Ans. She never goes out anywhere—no further than my house. She is not confined to her bed much of the time, but she is poorly.

Q. What effect has her ill-health and feebleness had on her memory and mind for the last five or six years?

Ans. I don't see any change in her mind. Her trouble is stomach disease and lung disease.

Q. Has Rowena ever said anything to you concerning her lands or real estate lying at or near Lincoln, Nebraska?

Ans. No, sir.

130 Ques. Did you ever know until you were asked to give this deposition that she claimed to be the owner of any real estate in Nebraska?

Ans. No, sir; I did not.

Q. Have you ever known Rowena to be the owner of any personal property except that in and about the old home?

Ans. No, sir; I did not.

ELIZABETH YOUNG.

And also, to further maintain the issues in this cause, the defendant read in evidence the deposition of Emily Roberts as follows:

"EXHIBIT 18."

EMILY ROBERTS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Ques. State your full name, age, and place of residence.

Ans. Emily Roberts; I am forty-four years of age, and my place of residence is Zanesville, Muskingum county, Ohio.

Q. You are the sister of Mrs. Elizabeth Young, who has just testified, and reside with her?

Ans. Yes.

Q. How long have you resided with your sister?

Ans. About seventeen years.

Q. During this time have you not been personally acquainted with Rowena Young, the plaintiff in this case?

Ans. Yes, sir; I have.

Q. Have you during all these years been on friendly terms with Rowena Young and visited back and forth?

Ans. Yes, sir.

Q. Has Rowena Young at any time during your acquaintance with her been engaged in any other business, occupation, or

131 trade except that of house-keeper in the old home?

Ans. No, sir; she has not.

Q. Has Rowena ever said anything to you concerning her lands or real estate lying at or near Lincoln, Nebraska?

Ans. No, sir.

Q. Have you ever known of her buying or selling property or investing money in speculation of any kind whatever?

Ans. No, sir; I have not.

Q. Have you ever known of Rowena owning any real estate except her interest in the old homestead property inherited from her father?

Ans. No, sir; I have not.

Q. Have you known of her owning any personal property of any kind except that in and about the old home?

Ans. No, sir; I have not.

Q. Did you ever know until you were asked to give this deposi-

tion that she claimed to be the owner of any real estate in Nebraska?

Ans. No, sir; I did not.

Q. What, if anything, has Rowena ever said to you about having certain lawsuits pending in Nebraska for the recovery of large and valuable tracts of real estate?

Ans. She has never said anything to me.

EMILY ROBERTS.

Also, to further maintain the issues in this cause, the defendant read in evidence the deposition of Robert Lee, as follows:

"EXHIBIT 19."

132 ROBERT LEE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

1st Ques. State your full name, age, and place of residence.

Answer. My full name is Robert Lee; my place of residence is Zanesville, Muskingum county, Ohio, and I am seventy-one years of age.

2d Q. How long have you resided in Zanesville?

Ans. In the vicinity all my life. Never lived more than five miles out. I lived in Zanesville from 1824 to 1855. I lived on a farm from 1855 to 1860, and have since lived in Zanesville.

3 Q. What official position do you now hold in Muskingum county, and how long have you held it?

Ans. I am one of the commissioners of Muskingum county, and have been serving my second term since last fall a year ago.

Ques. How long have you known the Young family, whose residence is at the corner of River and Keen streets, in the city of Zanesville?

Ans. Over forty years.

Ques. How long have you known Rowena Young, the plaintiff in this case?

Ans. Over forty years.

Ques. Have you ever known of her being engaged in any business, trade, or occupation other than that of house-keeper in the old home?

Ans. No; I have never known her engaged, except as house-keeper at the old home.

Q. Have you ever known of her owning any real estate, except the share inherited by her in the old homestead?

Ans. Never.

Q. Have you ever known of her owning any personal
133 property of any kind, except that in and about the old home?

Ans. Never.

Q. Have you ever known of Rowena Young buying or selling property or investing funds of any kind in any property or speculation?

Ans. No, sir; I have not.

Ques. Have you ever heard before that Rowena claimed to be the owner of any real estate in the State of Nebraska?

Ans. Never.

Ques. Did you ever take the assessment or valuation of property for assessment in the ward in which Rowena Young resides?

Ans. I assisted in taking it.

Ques. In what year was it?

Ans. In 1878 or 1879.

Ques. Did you take the assessment that year of personal property in the neighborhood of the Young residence?

Ans. I think so.

Ques. Did Rowena Young, the plaintiff in this case, return any personal property for assessment in that year?

Ans. She did not.

Q. About what was the population of the city of Zanesville when you first knew the Young family?

Ans. Not over four thousand.

Ques. About what was the population of the city of Zanesville in 1885?

Ans. 18,000 to 20,000.

Ques. Were you acquainted with Ephriam Young in his lifetime?

Ans. Yes; I was.

Ques. What property in the form of real estate did Ephraim Young own at the time of his death except his old homestead at the corner of River and Keen streets, so far as you know?

134 Ans. I am under the impression that he owned one or two lots above the old homestead, and there was a twelve-acre lot on the Frazeysburgh road that he owned once. I can't be positive about the lots, but that is my impression.

ROBERT LEE.

And also, to further maintain the issues in this cause, the defendant read in evidence the deposition of Henry C. Peters, as follows:

"EXHIBIT 20."

HENRY C. PETERS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Question one. State your full name, age, and place of residence.

Ans. My full name is Henry C. Peters, my age is sixty-three years, and my place of residence is the corner of River and Keen streets, in the city of Zanesville, 8th ward, Muskingum county, Ohio.

Ques. How long have you resided on the corner of River and Keen streets?

Ans. Fifty years.

Ques. What is the distance from your residence to the homestead of the Young family?

Ans. There is simply a street between us of 66 feet or 68 feet in width.

Ques. Was the Young family residing there when you located at that place?

A. Yes.

Ques. About how old was Rowena Young, the plaintiff in this case, at the time you moved there?

135 Ans. I should judge that she was older than I am.

Ques. During your acquaintance with Rowena has she ever engaged in any other business, occupation, or trade except that of keeping house in the old home?

Ans. None that I knew of.

Ques. What property did Ephriam Young, the father of this family, leave at his death?

Ans. I suppose the father owned about two lots along that street—River street. Then I think he owned a piece of property on the Frazeysburgh road. I don't know how many acres there was in it.

Ques. What, in your judgment, would be the fair value of the Young property at the corner of River and Keen? I mean its present value.

Ans. Four or five thousand dollars.

Ques. The Young family still own all the property on that street left by the father, do they not; and, if not, who does own it?

Ans. I believe they still own it.

Ques. Were you ever assessor for the 8th ward; and, if so, what year?

Ans. No, sir; I never was.

Ques. Have you ever known of Rowena Young buying or selling property or investing money in any business or speculation of any kind?

Ans. No, sir; I have not.

Ques. Have you ever known of her owning any real estate except her interest in the old homestead property inherited from her father?

Ans. No, sir; I have not.

136 Ques. Have you ever known of owning any personal property of any kind except that in and about the old home?

Ans. No, sir; I have not.

Ques. Did you ever know until you were asked to give this deposition that she claimed to be the owner of any real estate in Nebraska?

Ans. No, sir; I did not.

Ques. Has anything of the nature of ill-feeling or unneighborly relations existed between you and Rowena Young?

A. No, sir.

Ques. What has been the physical condition of Rowena the last five or six years?

Ans. I haven't heard of anything except age working on.

Ques. Has age made her infirm and feeble?

Ans. I can't say. She is not as spry as she used to be. She still works around the house, more or less.

Ques. Has she resided constantly at the old home since you first knew her?

Ans. Yes, sir; she has.

HENRY C. PETERS.

Also, further to maintain the issues in this cause, the defendant read in evidence the deposition of James McIntosh as follows:

"EXHIBIT 5."

JAMES MCINTOSH, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

1st Question. State your full name, age, and place of residence.

Ans. James McIntosh; am fifty-two years of age, and place of residence is 169 River street, in the city of Zanesville, Muskingum county, Ohio.

137 Q. You are the husband of a lady who was raised by one of the Young family, are you not?

Ans. I was. My wife is dead.

Ques. When were you married?

Ans. In 1867 or 1868; I forget which.

Ques. Have you since that time been acquainted with Rowena Young, the plaintiff in this action?

Ans. In a general way; yes.

Ques. What is the distance from your residence to that of the Young residence, corner of River and Keene streets?

Ans. Well, it is inside half a square—just half a square.

Ques. Have you ever known of Rowena owning any real estate except her interest in the old homestead inherited from her father?

Ans. No, sir; I have not.

Ques. Have you ever known of her owning any personal property except that in and about the old home?

Ans. No; I have not.

Ques. Have you ever known of her engaging in any other business, occupation, or trade except that of keeping house in the old home?

Ans. No, sir; I have not.

Ques. Which one of the Young family was it that your wife was raised by?

Ans. Georgiana.

Ques. Have you ever heard before you were asked by me to give evidence in this case that Rowena claimed to own in her own name any real estate in Nebraska?

Ans. No.

Ques. Have you ever known of Rowena investing any money in any business or speculation or buying or selling real estate in her own name or in any form?

138 Ans. No; I have not.

Ques. You have known something of her financial circumstances for the last fifteen or twenty years?

Ans. I have by hearsay.

Ques. What, if anything, do you know about the financial standing and ability to invest money of these Young sisters?

Ans. I heard of them sending about three hundred dollars to get a Young relative out of a scrape at Columbus, and that he was indignant that they didn't send him more, and I learned that was all they had. This was about eight years or more ago.

Q. Who, at that time, contributed to make up the three hundred dollars?

Ans. The girls, as they were called, Martha and Rowena.

Ques. State in what physical condition and state of health Rowena has been for the last five or six years.

Ans. I should say old and infirm.

Ques. What relation is Rowena Young, the plaintiff in this case, to Jane Y. Irwin, of Nebraska City, Nebraska?

Ans. A sister.

JAMES McINTOSH.

Also, to further maintain the issues in this cause, the defendant read in evidence the depositions of James A. Wolfe as follows:

"EXHIBIT 6."

JAMES A. WOLFE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz.:

Ques. State your full name, age, and place of residence.

Ans. James A. Wolfe; my age is thirty-three years of age,
139 and my place of residence 163 River street, in the city of Zanesville, Ohio.

Ques. How long have you resided in Zanesville?

Ans. Thirty-two years.

Ques. What is your occupation, and where is your shop, and how long has it been there?

Ans. Boot and shoe maker; my shop is at 161 River street, and I have been there since 1879. I reside next door to the shop.

Q. What is the distance from your residence and shop to the Young residence, on the corner of River and Keen streets?

Ans. It is inside of half a square.

Ques. Have you since 1879 known Rowena Young, the plaintiff in this case?

Ans. I know her when I see her.

Ques. Has she during this time been engaged in any other business occupation or trade except that of keeping house in the old home?

Ans. No, sir; she has not.

Ques. What is her manner and mode of life?

Ans. She lives moderately and dresses commonly. I have seen her do her own washing. I can see her back yard from my shop.

Ques. Have you ever seen anything about Rowena Young or her habits of life and surroundings that would indicate the possession of considerable sums of money or large property interests?

Ans. No, sir; I have not.

Q. Did you ever know of her or hear of her owning any real estate except her interest in the homestead inherited from her father?

Ans. No, sir; I did not.

Ques. Did you ever know of her owning any personal property of any kind whatsoever except that in the old home where
140 she lives?

Ans. No, sir.

Ques. Did you ever know, before you were asked to give evidence in this case, that she claimed to be the owner of any real estate in Nebraska?

Ans. No, sir; I did not.

Ques. Has Rowena Young lived on the corner of River and Keen streets constantly since you first knew her?

Ans. To the best of my knowledge she has.

JAMES A. WOLFE.

Also, to further maintain the issues in this case, the defendant offers in evidence the contract reading as follows:

"EXHIBIT 21."

Memorandum of agreement, made this 12th day of March, 1887, by and between Rowena Young, of Zanesville, Ohio, by Jane Y. Irwin, her attorney-in-fact, of Otoe county, Nebraska, of the first part, and William H. B. Stout, of Lancaster county, Nebraska, of the second part, witness:

For and in consideration of the sum of five hundred dollars in hand paid by William H. B. Stout, the receipt whereof is hereby acknowledged, and the further sum of thirty thousand five hundred dollars to be paid within two years by said Stout to said Jane Y. Irwin, attorney-in-fact as aforesaid, the said Rowena Young does hereby agree to sell and convey to said Stout, his heirs or assigns, that certain real estate described as the northeast quarter of the southwest quarter of section twenty-four (24), in township ten (10) north, range six (6) east, in Lancaster county, Nebraska, provided, however, and it is expressly understood, that in case said sum of $30,500 be not paid within the time limited this contract shall
141 be void and said sum of $500 kept and retained as stipulated damages. It is further provided and understood that said $500 is paid as the consideration for the granting by said first party to said Stout of an option or privilege within two years to purchase all the rights of Rowena Young and Jane Y. Irwin in and to said premises at the price of $30,500, in which event the $500 paid is to apply as part of such purchase-money, but if he do not purchase is to be forfeited to and retained by Rowena Young. It is expressly provided that the conveyance or deed to be made by said Young to Stout under this contract shall be without covenants of title or warranty. It is further provided, as the title to said premises is now in litigation, that if such litigation is not terminated within one year

and a half after this date the option period shall be correspondingly extended so that it shall not expire until six months after suit is finally terminated and title settled, and in the meantime said Stout shall pay all expenses of litigation and maintain the suit for title in good faith.

In witness whereof the parties of the first part hereunto set their hands this 12th day of March, A. D. 1887, in duplicate.

ROWENA YOUNG,
By JANE Y. IRWIN,
Attorney-in-Fact.
W. H. B. STOUT.

In presence of—
FRANK P. IRELAND.

Endorsement on back of contract: Rowena Young to W. H. B. Stout. Contract to sell N. E. ¼ S. W. ¼, 24, 10, 6, $—.

Also, to further maintain the issues in this case, the defendant offered in evidence the power of attorney reading as follows:

142 "EXHIBIT 22."

Know all men by these presents that I, Rowena Young, a single woman, of Zanesville, in the State of Ohio, being advised that Jane Y. Irwin, of Otoe county, Nebraska, is in treaty with William H. B. Stout, of Lancaster county, Nebraska, for the consideration of $500 paid by said Stout, to grant said Stout the privilege within two years to purchase the northeast quarter of the southwest quarter of section 24, township ten north, range six east, in Lancaster county, Nebraska, at the sum of $—, to be paid, including said $500, she, said Jane Y. Irwin, acting as my agent or attorney-in-fact in so doing, the option period, however, not to expire until six months after the litigation respecting the title shall terminate and the title be settled:

Now, therefore, I, being fully advised, do hereby name, constitute, and appoint said Jane Y. Irwin my true and lawful attorney, in the [my] name and stead to complete such treaty and to make, execute, and acknowledge and deliver any deed, contract, or instrument on my behalf and in my name that shall be necessary in so doing; and I do further name, constitute, and appoint said Jane Y. Irwin my true and lawful attorney, in my name and stead to bargain, sell, and convey said lands on such terms and to such persons as she may see fit, for cash or upon credit, or to grant privilege to purchase, at her discretion, and to make, execute, acknowledge, and deliver in my name and behalf any deed, contract, or instrument shall [which] shall to her seem advisable, but without covenant of title or against incumbrances or of warranty, hereby, except as to covenants as aforesaid, ratifying and confirming all that my said attorney has done or shall do in said premises, granting, moreover, to

her full power of substitution and to do all respecting said
143 lands, their sale and conveyance, or the settlement of litigation, compromise of adverse suits and maintenance of suits to recover and settle the title, and to do everything and perform all matters in any way connected with said lands or the title thereto which shall to her seem advisable or which I could myself do if personally present.

In witness whereof I have hereto set my hand this 19th day of March, A. D. 1887.

ROWENA YOUNG.

In presence of—
A. J. ANDREWS.
HARRIET L. YOUNG.

STATE OF OHIO, } ss:
County of Muskingum, }

Be it remembered that on this 19th day of March, A. D. 1887, before me, the undersigned, a notary public duly appointed, commissioned, and qualified for and residing in said county, personally came Rowena Young, to me known to be the identical person described in and who executed the foregoing power of attorney and who subscribed the same in my presence, and she acknowledged the foregoing instrument of power of attorney to be her voluntary act and deed by her voluntarily executed for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at Zanesville, in said county, the day and year last above written.

[SEAL.] ALBION J. ANDREWS,
Notary Public.

(Endorsed:) Rowena Young to Jane Y. Irwin. Power of attorney.

144 STATE OF NEBRASKA, } ss:
County of Douglas, }

I, Charles A. Potter, a stenographic reporter, do hereby certify that the above and foregoing is a true and correct transcript of the evidence given before said court upon the trial of the said action and of the record evidence adduced therein and of the proceedings had, taken, and done in the said court on the trial of the said matter, and true and correct copies of the respective petitions and answers on file in said cause upon which the said matter was heard.

Witness my hand this 24th day of December, A. D. 1888.

C. A. POTTER,
Stenographic Reporter.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, David J. Brewer, circuit judge in and for said State and district

of Nebraska, do hereby certify that the annexed and foregoing are true and correct transcripts of the several petitions filed in the said several causes for want of jurisdiction and of the respective answers filed by the plaintiff in the said several causes thereto and of the orders and judgment of the court thereon and on the testimony, dismissing said applications and petitions of the said several defendants, and is also a true and correct copy and transcript of the evidence adduced *on the evidence* on the hearing of the said matter and proceedings and of the record evidence read and adduced upon the said hearing and the whole thereof, and of all of the proceedings had or taken by the court touching said matter; and thereupon, on request of the said several defendants to said action, I have
145 signed this bill of exceptions, at the November term of our said court, on this — day of December, 1888, and ordered the same to be filed and made a part of the record in each of the above-entitled causes according to the stipulation of the respective attorneys made in open court.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

Jan. 5, 1889.

Upon the back of said bill of exceptions appears endorsements in words and figures following, to wit: No. 348, H. 349 & 350, H. U. S. circuit court, district of Nebraska. Rowena Young *vs.* John C. Deputron and Rowena Young *vs.* Hariet M. Leighton *et al.* and Rowena Young *vs.* Lincoln Driving Park Asso. Bill of exceptions. Filed Jan. 5, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 12th day of January, 1889, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

146 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Rowena Young, plaintiff, and John C. Deputron, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the

said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 8th day of January, 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 348, H. United States circuit court, district of Nebraska. John C. Deputron, plaintiff in error, *vs.* Rowena Young, def't in error. Writ of error. Filed Jan. 8, 1889. Elmer D. Frank, clerk.

147 THE UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To Rowena Young, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein John C. Deputron is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 8th day of January, 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 8th day of Jan'y, 1889, I received this citation, and on the 12th day of Jan'y, 1889, I served the same upon R. S. Hall, attorney of record for Rowena Young, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska.
By R. E. ALLEN,
Deputy United States Marshal.

Marshal's costs, $—.

[Endorsed:] Filed Jan. 12, 1889. Elmer D. Frank, clerk.
[Endorsed:] No. 348, H. United States circuit court, district of Nebraska. John C. Deputron, plaintiff in error, *vs.* Rowena Young, def't in error. Citation. Filed Jan. 12, 1889. Elmer D. Frank, clerk.

Marshal's costs:

Service	2 00
Mileage	06
Total	$2 06

148 Thereupon, afterwards, at the November term of said court, on the 9th day of January, 1889, the following proceedings were had and done, as appears of record on Journal "N" of said court:

ROWENA YOUNG
vs.
JOHN C. DEPUTRON. } 348, H.

Now come the parties hereto, by their attorneys, and, consenting thereto in open court, it is ordered by the court that the supersedeas bond herein be, and the same is hereby, fixed at ten thousand dollars.

Thereupon, afterwards, to wit, on the 7th day of February, 1889, a bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, John C. Deputron, as principal, and Samuel W. Little and Benson Wood, as sureties, are held and firmly bound unto Rowena Young in the full and just sum of ten thousand dollars, to be paid to the said Rowena Young, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21 day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Rowena Young and John C. Deputron, judgment was rendered
149 against the said John C. Deputron; and the said John C. Deputron having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Rowena Young, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the 2 Monday of October next:

Now the condition of the above obligation is such that if the said John C. Deputron shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

JOHN C. DEPUTRON.
SAMUEL W. LITTLE.
BENSON WOOD.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 348, H. Unites States circuit court, district of Nebraska. Rowena Young *vs.* John C. Deputron. Bond. Filed Feb. 7, 1889. Elmer D. Frank, clerk.

150 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska in the eighth circuit, do hereby certify that the foregoing folios, from one to 150, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk in the case of Rowena Young *vs.* John C. Deputron, and that copy-s of the writ of error and citation have been lodged and remain in my said office.

Witness my hand and the seal of said court, at Omaha, this 14th day of February, A. D. 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1151. John C. Deputron, plaintiff in error, *vs.* Rowena Young. Filed May 20, 1889.

Office Supreme Court U. S.
FILED,
NOV 21 1889,
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT,

OF THE UNITED STATES.

October Term, 1889.

JOHN C. DEPUTRON,
Plaintiff in Error.

vs.

ROWENA YOUNG,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
Attorneys for Plaintiff in Error.

Gilbert Pub. Co., Printers, Whitney Hotel Block.



IN THE

SUPREME COURT,

OF THE UNITED STATES.

October Term, 1889.

JOHN C. DEPUTRON,
Plaintiff in Error.

vs.

ROWENA YOUNG,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

On the 14th day of June, 1884, the defendant in error filed in the Circuit Court for the District of Nebraska her petition in ejectment, (Record p. 1), alleging that she was a resident and citizen of the State of Ohio; that the plaintiff in error was a resident and citizen of Nebraska, and that she was the owner and

entitled to the possession of the W. ½ of N. E. ¼, S. W. ¼, Section 24, T. 10, R. 6, in Lancaster County, Nebraska. On July 14, 1884, the plaintiff in error answered (Record p. 2). Under which he claimed ownership of the demanded premises by three distinct and separate chains of title, viz: First—Tax deed with ten years adverse possession. Second—Judicial sale and mesne conveyances. Third— Conveyance from plaintiff's grantor and mesne conveyances.

November term, 1885, first trial had verdict for defendant, and judgment thereon, which was set aside on motion of plaintiff and new trial awarded, (Record p 5). On March 5, 1886, by leave of court reply was filed consisting of specific and general denials of the allegations of the answer, (Record p 6). On March 8, to 12, 1886, inclusive, trial was had to the court and a jury resulting in a special verdict of 41 findings, (Record p 8 to 14). On the 15th day of March, 1886, the defendant below filed his motion for judgment on the special verdict, (Record p 15). On April 19, 1886, the plaintiff below also moved for judgment as prayed in petition on special verdict of jury, (Record p 16). On the 10th day of May, 1886, the respective motions of parties for judgment were submitted on briefs to be filed, (Record p 16). On the 9th day of November, 1887, and pending consideration of the motions for judgment, by leave of court, the defendant Deputron filed his petition (Record p 17) challenging the jurisdiction of the circuit court to hear and try said cause, alleging that the plaintiff below was not the real party in interest, and that the record title of the property in controversy was collusively and fraudulently transferred to her for the sole purpose of vesting apparent

jurisdiction in the federal court, and that the case did not really and substantially involve a suit or controversy properly within the jurisdiction of the circuit court, and that the parties thereto had been improperly made and joined for the sole purpose of creating a case cognizable in said court.

On the 31st day of January, 1888, an answer to said petition was filed, consisting of certain admissions and general and special denials, (Record p 21).

EVIDENCE ON THE QUESTION OF JURISDICTION.

1st. (Record, Page 53). Quit-claim deed of demanded premises with other lands from Jane Y. Irwin to Rowena Young, dated June 11th, 1884.

2nd. (Record 53 to 57). Summonses in this and two other actions issued June 14th, 1884.

3rd. (Record 84). Deposition of James McIntosh who testifies in substance that he is acquainted with the Young family; that he never knew of Rowena Young owning any real estate or personal property, except what she inherited from her father, and she has never engaged in any business on her own account.

4th. (Record 85). Deposition of James A. Wolfe, who testifies that since 1879 he has resided a half square from Rowena Young, and has never known of her being engaged in any business, trade or occupation, except doing house work, and has never known of her owning any real or personal property, except that inherited from her father.

5th. (Record 57 and 58). Transcript of docket showing deposit of money by Jane Y. Irwin as a deposit on account of costs in this case.

6th. (Record 58 to 61). Deposition of William P. Young, who testifies that he is a brother of Rowena Young, and never knew of her sending any money to her sister Jane in Nebraska, except what he heard them say about it; that in 1867 the land in controversy was deeded to him, that his sister Jane in Nebraska employed attorneys to litigate the title to this property, and that the litigation was afterwards transferred to the federal court; that he never considered that he had any law-suit in Nebraska; that he conveyed it back to his sister Jane in 1874, and that he has never been out of the state of Ohio.

7th. (Record 61 to 67). Deposition of plaintiff, Rowena Young; who testifies in substance that she is 70 years old; that the deed from Jane to her was made for her sole interest, and she is the real owner of the interest thereby conveyed; that this land was originally entered with money coming out of her father's estate belonging to herself and her sister Jane; that she has never disposed of or encumbered any of the property inherited by her from her father; that she never writes any letters, but usually signs her own name; that she has no personal recollection as to the time when any moneys were sent to her sister Jane, or as to the amounts; that any moneys sent to her sister Jane since 1858 were sent by her brother William; and that some strangers called upon her since this suit was commenced and talked about this property; that her sister Jane hearing of this, went to Ohio, and told Rowena that she did not like it because Rowena had not told her of this visit of the strangers, and when told what the conversation had been, Jane said, "that she did not know as it would make any difference, as I had

not given an affidavit," and she cautioned her not to talk any more about it, and she had not. And that she had never been to Nebraska or seen the property in controversy.

8th. (Record, 67 and 68). Deposition of Harriet L. Young, who testifies that she is the wife of William P. Young and knows nothing of the intent of the deed of June 11th, 1884, except what Rowena told her, and was present at the conversation between Rowena Young and the strangers alluded to by her and heard part of their conversation.

9th. (Record, 27, 28 and 29). Testimony of William J. Atwell, who testifies, age 24, engaged in real estate business, Zanesville, Ohio. On the 17th day of May, 1887, he called on Rowena Young to inquire about the property in controversy; that the plaintiff then told him she did not know how it was located; that Jane Y. Irwin of Nebraska looked after it for her; that it was supposed to be worth $100,000; that she had made some deeds, signed some papers but did not know to what part or to what extent. She did not mention any suits pending about the property. She had never been in Nebraska.

10th. (Record, 68). Warranty deed from John and Jane Y. Irwin to William P. Young covering the property in controversy, dated August 9, 1867, consideration, $490.00.

11th. (Record, 69). Quit-claim deed from William P. Young to Jane Y. Irwin covering property in controversy, dated February 5, 1874, consideration $500.00.

12th. (Record, 70). First interrogatory and answer in deposition of Jane Y. Irwin taken on the trial of this

cause, who testifies that she is 59 years old, resides at Nebraska City, Nebraska. Remainder of deposition not put in evidence.

13th. (Record, 73 and 74). Deposition of William T. Donovan, who swears that prior to August, 1875, Jane Y. Irwin placed this property in his hands for sale, and left it with him until he sold it.

14th. (Record, 75.) Second and third paragraphs of the special verdict of the jury in this case.

15th. (Record, 75 to 77). Plaintiff's deposition of John Irwin in which he testifies that he has no recollection of giving the power of attorney to Donovan, and does not recollect of being on intimate terms with Donovan or reposing any confidence in him. Resides at Nebraska City, and is the husband of Jane Y. Irwin.

16th. (Record, 29 and 30). Testimony of defendant John C. Deputron, who testifies, that he resides in Lincoln, and had no knowledge at the time of the trial of this cause to the jury, in 1886, as to whether or not Rowena Young was the owner of the property.

17th. (Record, 30). It is admitted that Jane Y. Irwin and John Irwin have lived at Nebraska City, Nebraska, since 1862.

18th. (Record, 77 to 80). Deposition of Elizabeth Young, who testifies that she is 66 years old, resides at Zanesville, Ohio; has been connected with the Young family 41 years, her deceased husband was Rowena's brother; has lived for 41 years a half a square from the home of Rowena Young, and had been on friendly terms with her all that time, and never knew of her owning any real estate, except that inherited from her

father, and never knew of Rowena having any business occupation or trade, except keeping house; never knew of her buying or selling property; never knew until asked to give this deposition that she claimed to be the owner of any real estate in Nebraska.

19th. (Record, 80.) Deposition of Emily Roberts, who testifies that she is 44 years old, and is a sister of the last witness and resided with her seventeen years, and during that time has been acquainted with Rowena Young and on friendly terms with her, and never knew of her being engaged in any business, occupation or trade, except keeping house, and never knew of her buying and selling real estate; never knew before that she claimed to be the owner of any real estate in Nebraska.

20th. (Record, 81 and 82.) Deposition of Robert Lee, who testifies that he is 71 years old, and lived all his life in Zanesville, Ohio, and had known Rowena Young over forty years; never knew her to be engaged in any trade or occupation, except house-keeping, or owing any real estate, except that inherited, and never knew before that she claimed to own any property in Nebraska. She returned no personal property for assessment when he assisted in taking assessment in 1878 or 1879.

21st. (Record 82 to 84.) Deposition of Henry C. Peters, who testifies that he is 65 years old, and has for fifty years resided within sixty-six feet of the Young residence, and known Rewena all that time, never knew of her engaging in business; the Youngs still hold all the property left them by their father; never knew of Rowena owning any real estate, except that inherited, and never knew before that she claimed to own any

real estate in Nebraska; have always been neighborly and friendly.

22d. (Record 30 to 35.) Testimony of H. H. Wilson, who testifies that on May 17th, 1887, at Zanesville, he had a talk with Rowena Young, and in that conversation she told him that she did not know where the property in controversy was situated, whether it was cultivated or unbroken prairie, or whether any buildings were on it. She then said that witness should go and see her sister. Mrs. Irwin, in Nebraska, and whatever she did would be all right; that it was not necesary to come back to her after negotiating with Mrs. Irwin, and purchase money could be paid to Mrs. Irwin; that she had conveyed part of this land, but did not know whether all or not, but never got any consideration for the deeds she made. She then told witness that her sister Jane wanted to give her an interest in the land. That she did not then have the deed from Mrs. Irwin; that Mrs. Irwin had taken back to Nebraska all the papers and that there was no question about the title to the property, and there were no suits pending concerning it, and she had no lawyers in Nebraska. Witness further testifies that her brother William P. Young being in the kitchen adjoining the room in which this conversation occurred, said to his wife, in the hearing of witness and Rowena Young, "Reen had better not tell all she knows about that land," and thereafter Rowena refused to talk about the property.

23d. (Record 35 to 39.) Testimony of Charles L. Hall, who testified that in April or May, 1887, he had a conversation with John Irwin, the husband of Jane Y. Irwin, at Nebraska City, in which he said the contract had been made between Mrs. Irwin and Mr. W.

H. B. Stout in the room in which we then sat in his house. A contract had been signed and $500.00 paid, of which Mrs. Irwin got all but 20 per cent which was retained by the attorneys, they were to have 20 per cent as fees, she got $400.00 and her attorneys $100.00; afterwards at a law office down town, Irwin said to witness, "I made a mistake, I told you Mrs. Irwin got $500.00 or $400.00, she did not get it, but she was owing me for money advanced in that litigation, and I took the $400.00 and applied it on her indebtedness to me." That was the subtance of our conversation.

24th. (Record 37 to 39.) Testimony of J. R. Webster, who was called by the defendant, and produced the contract between plaintiff and Stout, and testified that the signatures were genuine. Negotiations were opened about the 10th or 12th of March. Stout got me to negotiate in his behalf. I drew the contract and the power of attorney at the same time, either at Nebraska City or Lincoln; I think the money went through Mr. Hall's hands; the contract was signed at Nebraska City the day it bears date, and before the execution of the power of attorney.

25th. (Record 86.) Contract by which Rowena Young by Jane Y. Irwin, attorney in fact, agrees to convey "all the rights of Rowena Young *and Jane Y. Irwin* in and to" the premises in controversy and a deferred payment of $30,500.00 is to be paid to said Jane Y. Irwin. Contract dated March 12th, 1887.

26th. (Record 87.) Power of attorney from Rowena Young to Jane Y. Irwin executed at Zanesville, Ohio, March 19th, 1887.

ASSIGNMENT OF ERROR.

Plaintiff in error contends that there is error in the court's order, and judgment in this:

FIRST. Because it appears from the record and testimony challenging the jurisdiction of the circut court, that this suit does not really and substantially involve a controversey between citizens of different states; that at the commencement of this suit, Rowena Youug was not the real party in interest in this controversy.

SECOND. Because it appears from the record and testimony that three days before the commencement of this suit, Jane Y. Irwin a resident and citizen of Nebraska, conveyed the land in controversy to said Young, a resident and citizen of Ohio, and thereupon commenced and mantained this suit in the name of said Young without her knowledge or authority for the purpose of making a case congnizable by the said circuit court, when in truth and in fact the real controversy was between said Irwin and the plaintiff in error, then and now both residents and citizens of Nebraska; that the nature, purpose and object of said transfer was unknown to the plaintiff in error until after the trial and verdict of the jury in said cause.

THIRD. It was error to enter judgment for the plaintiff below on the special verdict under the issues joined in the pleadings without a finding of the necessary jurisdictional facts showing that the suit involved a controversy within the jurisdiction of the said circuit court.

FOURTH. The court erred in entering judgment for plaintiff below without a finding that the suit involved a controversy between citizens of different states.

FIFTH. Because the circuit court erred in holding that the tax deed to N. C. Brock, dated June 12, 1871, through which the plaintiff traces one chain of his title, as shown by the 17th paragraph of the jury's special verdict, was void so as not to operate to pass any title to the premises in controversy, notwithstanding said tax deed was accompanied by possessoin of said premises as shown by the 19th, 20th and 21st paragraphs of the jury's verdict.

SIXTH. Because the circuit court erred in holding that the tax deed to N. C. Brock, dated December 15, 1871, and through which the plaintiff in error traces one chain of his title, as shown by the 18th paragraph of the jury's special verdict, was void so as not to operate to pass any title to the premises in controversy, notwithstanding possession was taken and maintained thereunder, as shown by the 19th, 20th and 21st paragraphs of the jury's verdict.

SEVENTH. Because the circuit court erred in holding that under the laws of the state of Nebraska, as existing at the time of the execution of said tax deeds, *that when the facts of possession were found as in said 19th, 20th and 21st paragraphs*, it was necessary to the validity of said deeds that the Treasurer should accompany his signature to the same with the impress of an official seal.

EIGHTH. Because the circuit court erred in holding that the legal title did not pass to E. J. Curson through whom the plaintiff in error traces one chain of his title by virtue of the facts found in the 26th paragraph of the jury's verdict, and this notwithstanding the facts found in the 9th paragraph of the jury's verdict.

NINTH. After the legal title to the premises in controversy had passed to E. J. Curson, a disinterested purchaser by virtue of Sheriff's deed on October 10th, 1877, as found in the 26th paragraph of the verdict, it was error to hold that the opening of the order of confirmation on the 3rd of November, 1877 as found in the 9th paragraph of the virdict, worked a re-transfer of the legal title from Curson, the purchaser, to Jane Y. Irwin, the judgment debtor, because the order of November 3rd, 1877 did not purport to cancel and annul the sheriff's deed, and order the restoration of the purchase money or to place the parties in statu quo; and because *it is not found* that that court at that time had obtained jusisdiction of Curson the purchaser who, as the record shows, was not a party to the action in which the sale was made.

TENTH. Because it was error to hold that ejectment would lie on behalf of the plaintiff below to recover the possession of property, the legal title to which was at the time of the commencement of the suit as also the trial, vested in defendant below.

ELEVENTH. Whatever of legal title to the premises in controversy remained in Jane Y. Irwin, or John, her husband, on the 25th day of October, 1879, was conveyed to John P. Lantz of that date by said Jane Y. Irvin, and John, her husband by W. T. Donovan, their attorney in fact, and from said Lantz by mense conveyances, to the plaintiff in error, as shown by the 28th, 29th and 30th findings, and it was error for the Circuit Court to hold that ejectment would lie on behalf of the plaintiff below to recover the possession of said premises, while the legal title was so vested in the defendant below.

TWELFTH. The court erred in holding that ejectment would lie on an equitable title, if plaintiff below had any title, to recover possession of property, when the legal titles was in the defendant below.

THIRTEENTH. The court erred in entering judgement for plaintiff below awarding her possession of property not described in the petition, and property not contained within the boundary of the property described in the petition.

FOURTEENTH. The court erred in rendering judgment on the special verdict for the plaintiff below for property entirely distinct from that put in issue by the pleadings.

ARGUMENT ON JURISDICTION.

I.

At the very threshhold of this controversy, we are met by the question of jurisdiction. This record shows a remarkable transaction. The Irwins in 1867, when their property was involved in litigation in the courts of Nebraska, transferred their interest in it to William P. Young, of Ohio, the brother and managing agent of the defendant in error, and in his name that litigation was transferred to the federal courts, and there carried on at the expense, under the control and for the use and benefit of the Irwins. When in 1874 that litigation had terminated, we find the record title again in the name of the Nebraska sister, Jane Y. Irwin.

Again, the title is involved in dispute, and suits are about to be brought against the occupants of these valuable lands, now forming a part of a great city, and estimated worth a hundred thousand dollars. With this convenient non-resident brother, resides a maiden

sister seventy years old, without capital, without education, whose memory is impaired by sickness, and whose vital forces are so far reduced by age, that for years a half a block has been the farthest she has ventured from home. To this simple-minded old lady Mrs. Irwin "wanted to give an interest" in this forty acres of land estimated to be worth $100,000.00. A deed is executed to the aged Rowena, witnessed by and acknowledged before one of the attorneys of record in this case, at Nebraska City, Nebraska, June 11th, 1884, for the purported consideration of $1,000.00. Rowena says, if any moneys were ever sent to Jane on her account, they were sent by her brother William (pg. 65 record) and William says that all he ever knew of any moneys being sent to Jane by Rowena, was what he heard talked by Jane and Rowena. (pg. 59 record.) Three days after this deed was executed, and before it could have reached Zanesville and any instruction been sent to Nebraska directing suits to be brought, this litigation is commenced on June 14th, 1884; money is deposited by Jane Y. Irwin as security for costs; Jane's deposition is taken and used on the trial of the case, that of Rowena is not. Rowena was never in Nebraska, knew nothing of the location, character or condition of this property. Soon after the suits were commenced, Jane goes to Ohio and brings back all the papers connected with the transaction. March 12th, 1887, Jane makes a contract of sale, seven days before the execution of the power of attorney under which she is to execute it. Assumes to bargain and sell without conference with Rowena, and then sends a power of attorney prepared by counsel in this case, for Rowena to execute enabling Jane to pass the legal title to the purchaser. This remarkable contract provides for the

conveyance of the interest of Jane, as well as that of Rowena, and provides that the $30,500.00 deferred payment shall be made to Jane, the agent, instead of Rowena, the owner, and of the $500.00 cash payment $100.00 goes to the attorneys of Jane as their 20 per cent of the fruits and $400.00 to John Irwin to reimburse him for moneys advanced to Jane to pay costs in these suits. This contract was drawn by one of the attorneys of record in this case, and must be taken to express his idea of Jane's interest in this property. In May, 1887, Rowena says she never had any attorneys in Nebraska. that no suits were pending concerning this property, that she had no power to sell it, that Jane can sell, that purchase money should be paid to Jane. The astute William cautions Rowena "not to tell all she knows about that land," and when Jane hears that Rowena has talked about the land she hastens to Ohio and rebukes her for tattling, saying, however, that no harm had been done as she had given no affidavit, and gives her timely warning for the future. Rowena's deposition was taken, in her behalf, in this supplemental proceeding, in which proceeding it is charged that these suits were commenced and carried on without her knowledge or consent and for the use and benefit of the Irwins. She was examined by counsel who never fail to make inqury when inquiry is safe, and yet she nowhere speaks on this vital matter. Able counsel travel hundreds of miles for the purpose of examining this important witness in person, and yet the examination in chief consists of just seven questions and answers. That counsel regarded this as dangerous ground, is only too evident from the feline step with which they tread. The recital of the above undisputed facts leads to the irresistable conclusion that Jane Y.

Irwin being desirous of contesting the rights of the occupants of these lands, agreed to give her attorneys a contingent interest therein, and then without consideration placed the record title in her sister, residing in Ohio, for the sole purpose of vesting apparent jurisdiction in the federal courts, and then commenced and prosecuted this suit to a verdict, without the knowledge or consent of the nominal plaintif, for her (Jane) own use and benefit with the expectation of enjoying the fruits of the litigation.

II.

Where the subject matter of the controversy has been transferred to a nominal plaintiff who has no real interest in it, and the litigation is carried on and controled by the grantor or assignor for his own use and benefit, such transfer will be held colorable only and vests no jurisdiction in the federal courts.

Williams vs Nottawa, 104 U. S. 211.

Hawes vs Oakland, 104 U. S. 459.

Detroit vs Dean, 106 U. S. 541.

Hayden vs Manning, 106 U. S. 586.

Farmington vs Pillsbury, 114 U. S. 138.

Little vs Giles, 118 U. S. 602.

Bernards Township vs Stebbins, 109 U. S. 355.

Greenwalt vs Tucker, 10 Fed. Rep. 884.

Coffin vs Haggin, 11 Fed. Rep. 219.

Fountain vs Town of Angelica, 12 Fed. Rep. 8.

Chander vs Town of Attica, 22 Fed. Rep. 626.

De Laveaga vs Williams, 5 Sawyer 574.

M'Lean vs Clark, 31 Fed. Rep. 501.

III.

This want of jurisdiction will not be waived or cured by going to trial without objection, and this court when satisfied that the apparent jurisdiction of the circuit court was fraudulently obtained, will reverse the judgment and dismiss the case.

Williams vs Nottawa, 104 U. S. 209-211.

Hawes vs Oakland, 104 U. S. 450-459.

Hayden vs Manning, 106 U. S. 586.

Bernards Township vs Stebbins, 109 U. S. 340.

Farmington vs Pillsbury, 114 U. S. 143.

Cashman vs Canal Co., 118 U. S. 58.

IV.

Objections to the jurisdiction never come too late and will be raised by the court on its own motion.

Hilton vs Dickinson, 108 U. S. 165.

Grace vs Insurance Co., 109 U. S. 278.

Cameron vs Hodges, 127 U. S. 325.

Chapman vs Barney, 129 U. S. 681.

V.

After veedict and before judgment the jurisdiction may be called in question by motion or by pleading tendering an issue on facts *de hors* the record.

Hartog vs Memory, 116 U. S. 588.

Greenwalt vs Tucker, 10 Fed. Rep. 884.

VI.

Among the things established in this case that have been commented upon by the courts as badges of a

colorable transfer for the purpose of vesting the federal courts with apparent jurisdiction are:

1. The total want of knowledge on the part of the plaintiff of the situation, condition and location of the property.

(Record, p. 28-32.)

Little vs Giles, 118 U. S. 606.

M'Lean vs Clark, 31 Fed. Rep. 504.

2. The indifference of the grantee and the activity of the grantor in the prosecution of the suit.

(Record, p. 32.)

M'Lean vs Clark, 31 Fed. Rep. 504.

3. The want or total inadequacy of consideration for the transfer.

(Record, p. 32, 65, 59.)

Hayden vs Manning, 106 U. S. 589.

Little vs Giles, 118 U. S. 605.

Coffin vs Haggin, 11 Fed. Rep. 220.

M'Lean vs Clark, 31 Fed. Rep. 504.

4. The grantor's control of the property after the alleged transfer.

(Record, p. 32, 35, 86.)

Little vs Giles, 118 U. S. 605.

M'Lean vs Clark, 31 Fed. Rep. 504.

5. The family relationship of the grantee and grantor.

(Record, p. 65.)

Hayden vs Manning, 106 U. S. 587.

Little vs Giles, 118 U. S. 606.

6. The petition was neither signed nor sworn to by the nominal plaintiff, and even the answer to the peti-

tion of defendant below to dismiss was filed without any verification whatever.

(Record, p. 1-22.)

Hayden vs Manning, 106 U. S. 587.

7. The non-production of the correspondence by which the transfer was affected.

(Record.)

Hawes vs Oakland, 104 U. S. 461.

Coffin vs Haggin, 11 Fed. Rep. 221.

Chandler vs Town of Attica, 22 Fed. Rep. 625-627.

8. The commencement of suit before grantee could have received deed and directed the beginning of litigation.

(Record, p. 53-56.)

Coffin vs Haggin, 11 Fed. Rep. 220.

9. The grantor furnishing the means to conduct the litigation.

(Record, p. 58.)

Cashman vs Canal Co., 118 U. S. 61.

10. Plaintiff had never seen the property in controversy.

(Record, p. 28.)

Little vs Giles, 118 U. S. 606.

M'Lean vs Clark, 31 Fed. Rep. 503.

11. The attorney of record, Frank P. Ireland, witnessed and acknowledged the deed of *Jane* on June 11th, 1884, and without showing any employment by *Rowena*, he files the petition in this case on June 14th, 1884.

(Record, p. 1-53.)

Chandler vs Town of Attica, 22 Fed. Rep. 625.

ARGUMENT ON SPECIAL VERDICT.

I.

Here again arises the question of the jurisdiction of the court to enter the judgment on the special verdict. It will be seen that the special verdict nowhere finds the citizenship of either the plaintiff or the defendant. A finding as to the citizenship of the parties was necessary to enable the court to render judgment.

Halsteel vs Buster, 119 U. S. 241.

Menard vs Goggan, 121 U. S. 253.

Everhardt vs Huntsville, 120 U. S. 223.

Chapman vs Barney, 129 U. S. 681.

All the facts necessary to a recovery must be found in the special verdict, or the judgment will be reversed.

Chessapeake Ins. Co. vs Stark, 6 Cranch 273.

In the case of Barnes vs Williams, 11th Wheaton, 415 in an opinion delivered by Chief Justice Marshall it was held that althoungh a material fact, the assent of the executor, might have been found from the evidence in the special verdict, yet because it was not found as a distinct fact, the special verdict was too imperfect to support the judgment, and a new trial was awarded.

In the case of Prentice vs Zane's Administrator, 8 Howard, 484 Grier, Justice, says: "Where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficent evidence to establis them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below with directions to award a *venire de nove.*"

In the case of Suydam vs Williamson, 20 Howard, 433, Justice Clifford in delivering an opinion of the court said: "After the special verdict is arranged, and it is reduced to form, it is then entered upon the record, together with the other questions in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decison, he may resort to a court of error, where nothing is open for revision; except the questions of law inferentially arising on the facts stated in the special verdict."

In the case of Munford vs Wardwell, 6 Wallace 432, the same learned justice speaking for the court said: "By leave of the court such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing as in case of a demurrer."

In Hodges vs Easton, 106 U. S. 408, the judgment in the court below was based "upon the special verdict of the jury, *and facts conceded or not disputed upon the treal.*" This court quoted, with approval, the language of Chief Justice Marshall in Barnes vs Williams, to the effect, that every essential fact necessary to a recovery must be found in a special verdict, and held that a judgment founded partially on a special verdict and partially on conceded facts could not be sustained, and sent the cause back for a new trial.

In an early English case, upon which many American cases have been based, the following language is

used: "There is nothing more settled than that the court can intend nothing in a special verdict but what is found by the jury, Hob, 262 (who was as great a man as ever lived) expressly to this purpose, and there is this very good reason for it, the rule of law would otherwise be inverted, for *ad quaestionem facti non respondent judices, ad questionem juris non respondent juris non respondent juratores* 1 Just 556, therefore we are of opinion there is not snfficient matter found upon this verdict to intend this a good recovery."

Witham vs Earl of Derby, 1 Wilson 55 (1744).

Justice Coulter in Wallington vs Dunlap, 14 Pa. St. 32, (1850) speaking for the court says: "I apprehend there is no reported case, of any authentity, where the court have gone beyond the facts found in the special verdict, for it is the province of the jury to judge of the facts, and the province of the court to disclose the law on the facts so found. The *undisputed* facts ought to have been incorporated into the special verdict * * and when a special verdict is given, the court ought to confine its judgment to the verdict. * * * * But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict and partly on what are called undisputed facts, that we must do what has often been done before, reverse the judgment, and send the case back for a new trial."

2 Tidd's Practice 897.

II.

This is an action in ejectment in which plaintiff below sought to recover the possession of the property in controversy as "the owner in fee," and in the third defence in the answer such ownership is denied. This

case, therefore, is a *strictly legal* action to recover real estate, or ejectment.

In the federal courts, in an action of ejectment, a recovery can be had only upon the *strictly legal title;* and an equitable title will neither *support* or *prevent* a recovery in such an action.

Watts vs Lindsey, 7 Wheaton 158.

Bagnell vs Broderick, 13 Pet. 436-450.

Fenn vs Holmes, 21 Howard 481-483.

Hooper vs Scheiner, 23 Howard 235.

Sheirburn vs Cordova, 24 Howard 423.

Foster vs Mora, 98 U. S. 425.

Langdon vs Sherwood, 124 U. S. 83.

Johnson vs Christian, 128 U. S. 382.

"Any person having the equitable title to land cannot recover in an action at law on the ground that the legal or paper title is based upon fraud. The legal title must first be attacked and declared void by an action in chancery."

Walker vs Kynett, 32 Iowa 524.

Johnson vs Christian, 128 U. S. 381.

Bagnell vs Broderick, 13 Peters 450.

III.

The plaintiff in error traces one chain of his title to the premises in controversy, to Jane Y. Irwin, through execution sale and sheriff's deed to E. J. Curson. That Jane Y. Irwin's title passed to Curson on October 10th, 1877, by virtue of the facts contained in the 26th finding of the jury is, under the Nebraska code, incontestable. Sections 498 and 499 code, civ. pro. are as follows:

"Sec. 498—If the court upon the return of any writ of execution or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied in all respects that the sale has been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements; and the officer on making such sale may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto; agreeable to the order of the court."

"Sec. 499—The sheriff or other officer, who, upon such writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser or purchasers thereof, as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same, at the time they become liable to the judgment, or at any time thereafter."

It is contended, however, and was so held by the circuit court that this title while yet in the hands of Curson was wholly defeated by the facts contained in the 9th finding of the jury, which for convenience, we quote:

"9th. That the confirmation of sale was set aside by the district court of Lancaster county, in which it had been made November 3rd. 1877, before E. J. Curson had made any conveyance to any one, and was never

afterwards confirmed." A mere statement of what that court did and did not do on November 3rd, 1877, as recited in the 8th finding refutes the idea that the title that had passed to Curson was thereby defeated. It is at once apparent that the state court did not set aside or attempt to set aside the execution sale made to and consumated in Curson. That it did not cancel and annual or attempt to cancel and annul the sheriff's deed to Curson; that it did not order or attempt to order the judgment creditor to refund to Cnrson the purchase money; that the only thing that it did or attempted to do was to open the order of confirmation for further consideration, and here we reach the end of all that was done or attempted by the state court. If the court meant to affect the sale, the sheriff's deed, or Curson's rights in any way, it would have placed its intention beyond question by making orders expressive of that intention. The silence of the record on this question is conclusive of the fact that the state court regarded the sale, sheriff's deed and Curson's rights thereunder beyond the power of the court to interefere. This is entirely consistent with a correction of the alleged error in the confirmatory order, which, while it would not restore the property, would preserve the right of reimbursement from the judgment creditor. If setting aside the order of confirmation in the case of a consumated execution sale operates to revest the title in judgment debtor, its negative power greatly exceeds its affirmative power, because it is well established that making the order does not pass the title to the purchaser, and nothing but the proper deed will. Freeman on exections, § 324, and it is held by the Nebraska courts, that a formal delivery of the deed is also essential. Kingman vs Applegate, 20 Neb. 605.

An insuperable objection to such a result is that it involves an innocent purchaser in the loss of his money, as well as the title to the property, as no provision is made for its return. Even though vacating the confirmaory order, rendered Curson's title fatally defective yet as no provision was made for the return of the purchase money, he would hold the legal title as security for the purchase money paid, and with the rights of a mortgagee in possession, ejectment would not lie against him or his grantees.

Brobst vs Brock, 10 Wall. 372.

Oldham vs Pfleger, 84 Ill., 102.

While the confirmatory order is essential to the validity of the Sheriff's deed, in the first instance, because made so by statute, when the sale is consumated by deed to an innocent purchaser it may be vacated without affecting the purchasers rights.

Hunt vs Lanks, 38 Cal., 519.

Vancampen vs Snyder, 3 How. (Miss.) 67.

Cox vs. Nelson, 1 Monroe (Ky.) 95.

The sale was made in the case of Sessions vs. Irwin. Curson was a stranger to that suit, a bona fide purchaser, as the record bears witness (26th finding), the only relation he at any time sustained to the suit, arose from the fact that he became purchaser at an execution sale there under, and when the Sheriff's deed was delivered and the purchase money was paid the confirmatory order was in full force. By becoming the successful bidder at the sale he did not lose the character of such a purchaser, otherwise there could be no bonafied purchaser in execution sales, and the law is settled otherwise beyond dispute. It is an old doctrine

independent of statutory aid and necessary to the protection of parties that as respects third persons whatever is done under a judgment while in full force is valid and binding upon the parties litigant, notwithwithstanding a reversal of the judgment. Curson and his grantees are entitled to the benefit of this doctrine.

U. S. vs Bank, 6 Pet., 8.

Voorhees vs. Bank, 10 Pet.. 449.

Gray vs. Brignardello, 1 Wall., 627.

Grignons Lessee vs Astor, 2 How., 319.

In Watson vs. Ulrich, 18 Neb., 186, where judgment had been taken on substituted service and the defendant after the lapse of four years obtained an order to show cause why the judgment should not be vacated and he be let in to defend upon hearing the return to the rule the judgment was opened, and thereafter the suit was dismissed without prejudice. The defendant then brought action to recover the property constituting the subject matter of the suit which by reason of the judgment had passed into innocent hands while the judgment was in force; the court says in considering the right of the defendant to a restoration of his property under these circumstances that "the decree when rendered if the court had jurisdiction, is valid until set aside at least so far as bona fide purchasers of the property are concerned. And the order of the court permitting the defendant to answer and make his defense is merely for the purpose of determining the respective rights of the plaintiff and defendant, and does not affect innocent third parties; and the dismissal of the action will not affect their rights."

And it makes no difference that the application to open the judgment is made before the sale takes place.

Scudder vs. Sargent, 15 Neb., 102.

In Fahinger, et al, vs Fahinger 14 Phil. (Pa.)——

On rule to show cause why a sheriff's sale should not be set aside after delivery of the deed, the court said. "Where the justice of the case requires, the court may set aside a sheriff's sale after the deed is acknowledged, but yet remains in the hands of the sheriff. But this is the extent to which the courts have gone. After the deed is acknowledged and delivered the court has no jurisdiction to interfere."

To same effect. Shakespear vs Fisher, 11 Phil. (Pa.) 251.

The facts contained in the 9th finding of the jury are insufficient in law to affect the title of Curson and his grantees, in that it does not appear that he was notified of the motion to vacate the confirmatory order. Every essential fact must be found, this was an essential fact; whatever Curson's relation to the confirmatory order, it was in force when the deed was made and delivered. His rights under the deed and order were thereafter beyond the reach of the direct or indirect jurisdiction of the court without notice; the vacating order having been made without notice to him was void as to his title.

Osborn vs Cloud, 23 Ia. 238.

Wright vs M'Lain, 3 Ia. 241.

Lyster vs Brewer, 13 Ia. 461.

Toler vs Ayers, 1 Texas 398.

McKinney vs Jones, 7 Texas 598.

Williams vs Cummings, 4 J. J. Marsh 637.

Nor can notice be presumed. If to vacate the confirmatory order operated to defeat Curson's title, the

court was exercising a jurisdiction on motion which in the ordinary course of common law and chancery practice is only exercised upon formal issues and trial, and would be a summary proceeding in which the records of a court of general jurisdiction, and if the record, then the findings, must show affirmatively every fact essential to the exercise of that jurisdiction.

Thatcher vs Powell et al., 6 Wheat. 119.

Galpin vs Page, 18 Wall. 350.

State Bank vs Marsh, 5 Eng. Rep. 129.

McKinley vs Williams, 7 Texas 598.

But we are told in the opinion of the circuit court (record 23), "That one purchashing at an *execution sale* submits himself to the jurisdiction of the court as to matters affecting that sale." Attention is called to:

Phillips vs Dawley, 1st Neb. 320.

Bank vs Green, 10 Neb. 134 and

Gregory vs Tingley, 18 Neb. 322 in support of the doctrine. To what extent it is claimed the jurisdiction is acquired over the purchaser, we are not advised in the opinion or the citations. If the alleged jurisdiction empowers the court to accept the money of the purchaser at execution sale and destroy the vended title on the faith of which it was paid without protection to the purchaser, as in the case at bar, the doctrine is both novel and dangerous. If the citations are examined, it will be found that they both fall short of supporting the doctrine of the opinion, and are not properly precedents in the case at bar. Phillips vs Dawley, cited, was a sale of attached real estate, the plaintiff being the purchaser, the sale was reported and confirmed, but the sheriff omitted to make to the purchaser a deed;

four years afterward the plaintiff in the action procured a rule on the then sheriff to show cause why he should not execute to the plaintiff a deed for the vended premises. In return to the rule the sheriff showed that since the sale and confirmation he himself had purchased the property from the judgment debtor. It was in passing upon the question whether the plaintiff under the forgoing facts was entitled to a deed of the vended premises from the then sheriff that it is said the novel doctrine was born. It is apparent that no such doctrine could be the legitimate offspring of this cause, because the pprchaser was the plaintiff, who set the court in motion and over whom the court already had jurisdiction in the case generally. But even the dictum of the court announces no new doctrine nor does it support the opinion. It says: "A party to the sale, may appear before the court, and if any mistake has occurred may have it corrected. The purchaser therefore becomes a party in interest, and if he acquieces in the report, he is deemed to adopt it, and is bound by a decree of court confirming the sale."

Nor is the opinion better supported in Bank vs Green, 10 Neb. 130. The mortgaged property in this case was sold under decree of forclosure to Bank, the plaintiff in the case, on report of the sale it was confirmed by the court. To the order of confirmation exception was taken and *supersedeas bond filed*, and the case so far as that order was concerned, removed to the supreme court where it was reversed. On remand from the supreme court the sale was set aside, and the plaintiff ordered to restore the property to the defendant; the plaintiff claimed to have sold the property to a third party, and took exception to the order to restore the

property which he removed to the supreme court, and it is in passing upon this order to restore the property that had been conveyed to the plaintiff while the confirmatory order was suspended by supersedeas bond, that language is used which is supposed to support the circuit court's opinion. The sale in question was in pursuance to a decree of forclosure, and known as a judicial sale proper between which and execution sales a marked distinction exists. Freeman on executions, 2d ed. § 311, says: "It must be remembered there is a vast difference between execution sales and those made under decrees of chancery or probate courts *in respect to the rights of the purchasers and the powers of the courts.*" The supreme court of Nebraska recognizes the same distinction. In Bachler vs Webb, 11 Neb. 423, the court says, "when in the course of such litigation (equity) or settlement it became proper to sell real estate under the direction of the master, commissioner, or trustee—virtually under the direction of the court—every bidder at such sale was held to submit himself for the purpose of snch sale and purchase, to the jurisdiction of the court, and every question arising between different bidders, or between the court and any bidder, would be settled by the court on the same principles, and this care and over-sight of the court was often extended to the compelling of the purchaser to comply with the terms of his bid, and on the other hand to relieve him therefrom in cases where from any cause it were inequitable to enforce them." * * * * "It will thus be seen that while the statute provides that sheriff's sales shall pass under the scrutiny of the court, yet it falls far short of making them judicial sales in the well understood sense of those terms. Had it been the intention of the legislature to abolish the distinc-

tion between sheriff's sales and judicial sales, I think it would have provided that the powers and duties heretofore exercised by courts of equity in confirming and setting aside sales of real estate by masters and commissioners should thereafter prevail in all cases of sales by sheriffs on execution." Keeping this distinction in mind, the opinion in Bank vs Green cannot be made a precedent in the execution sale under consideration. Yet the language in Bank vs Green above does not support the circuit court's opinion. The court there says: "We do not fail to recognize the doctrine that all rights acquired under a judicial sale, made while the judgment is in force, should be protected, yet it must be understood that the doctrine is properly applicable only when the power to make the sale is clearly given." * * * * "One of the objections, indeed the principal one, to this order restoring to Green the property sold under the decree of forclosure is. that the plaintiff, who is the buyer, has since conveyed it to one Lee, who, it is claimed, is an innocent purchaser.

It is unnecessary here to decide whether, under the circumstances of this case, it were possible for Lee to have been an innocent purchaser, and as such to have acquired rights respecting the property superior to those of the plaintiff. *No such question is presented in the record*, and we must treat the case as one concerning the plaintiff and Green alone." The last case cited in support of this opinion is Gregory vs Tingley, 18 Neb. 318. This opinion affirms on appeal an order of the lower court which compelled the purchaser of premises sold under a decree of forclosure, a judicial sale proper, to complete his purchase by the payment of the pur-

chase money under circumstances peculiarly appropriate to the exercise of such jurisdiction. This was not a new exercise of power over the purchaser at *judicial sales* by courts of equity. We assert with confidence that the books will not show a case where this or a like power has been exercised in the case of an execution sale. Under the Nebraska authorities these cases where the power of the court in judicial sales proper were under consideration cannot be relied upon as precedents in execution sales.

The plaintiff in error knows of no case that substantiates the doctrine of the circuit court's opinion, that a court can by summary proceedings annual the title of innocent purchaser at execution sale when consumated by the execution and delivery of the deed without notice to the purchaser, and without making provision for the return of the purchase money; much less without an order for that purpose.

It is conceded the court had power to vacate its orders during the term, and by sec. 602 of the Nebraska code, unnecessary here to be quoted the court, is empowered to vacate or modify its judgments or orders after the term for any one of nine different reasons, for which application may be made, as provided by sec. 609 of the code as late as three years after judgment. If the court can reach an innocent execution purchaser at any time after confirmation and delivery of deed, it can do so at any time within three years after the con firmatory order. Such a doctrine would be a practical bar to bidders at execution sales, and work exceeding injustice to debtor and creditor, and is not supported by either principle or authority.

IV.

The plaintiff in error traces a second chain of his title to the premises in controversy to Jane Y. Irwin through her conveyance to John P. Lantz by her attorney in fact, William T. Donovan, for the consideration of $1,000.00 (29th paragraph verdict). The jury find that Donovan held such a power of attorney (4th and 28th paragraphs verdict.) from the Irwins to make conveyance when Scott Boyd and Lamaster should make sales, but it was not found that the power to Donovan to convey was limited on its face to sales made by Scott Boyd and Lamastor, nor can the contrary conclusion be fairly drawn from the verdict. The jury find that the power was executed by conveyance to Lantz on the 25th day of October, 1879, and that the deed was recorded on the same date (29th paragraph verdict). About a month subsequent to this conveyance, the power to Donovan was revoked without any finding as to cause of revocation. But the revocation of the power after it had been executed by conveyance to Lantz, could not effect his title, nor could a knowledge of such revocation affect the plaintiff in error who held by mesne conveyances under him. Although the conveyance by Donovan may have been fraudulent abuse of the power, yet the mere fact that the power was subsequently revoked, had no tendency to prove such fraud, and a knowledge of such revocation would not therefore operate to put plaintiff in error upon enquiry. There is nothing in the findings tending to impeach the bona fides of the latter. It is true that paragraph 40 of the verdict finds that John C. Deputron is the brother-in-law of S. W. Little, and that there is no proof of any consideration paid by Deputron to Little for such conveyance. The findings do not say what

conveyance is here referred to. If to the premises in controversy, it is only necessary to refer to the 37th paragraph of the verdict, where it is expressly found that Deputron paid Little $10,500.00 for the premises in controversy. If there was no proof of any considera-ation, how could the jury find the consideration to be $10,5000.00. The plaintiff in error is entitled to the benefit of this finding. There is nothing in the law which forbids a man dealing with his brother-in-law, nor that will raise a presumption against the bona fides of a transaction because of such relation. There is nothing in the findings that can be construed to affect the bona fides of the purchase by the plaintiff in error, and he is entitled to all the protection the law accords such a purchaser.

It is also true that the verdict finds for what purpose the power of attorney was given, but it is not found that that puopose is indicated by anything on the face of the power, nor is it found that the plaintiff in error had any knowledge or suspicion of such purpose, or that he knew of the existence of the Scott Boyd and Lamaster contract (2nd paragraph of verdict). Or that the deed to Lantz was not made pursuant to a purchase made through these last named gentleman, and therefore pursuant te the purpose for which the power was given, as found by the verdict. The consideration for the conveyance to Lantz is still retained by Jane Y. Irwin, her agents or attorney in fact, and no attempt to repudiate the conveyance appears to have been made, unless the revocation of the power or the transfer to the defendant in error is to be so regarded. There being no finding to that effect, no such presumption can be indnlged. On the other hand, he who con-

tends that a deed executed by his attorney, under a power to convey is invalid for matters not apparent on its face, on him rests the burden of sustaining that contention, and every presumption will be indulged to support the valid execution of the power.

1 Greenlief on Evidence, 12 Ed. (Redfield's) Sec. 46.

1 Phillips on Evidence (4th Ed. Cowen & Hill's Notes.) Marginal Pg. 605.

Clements vs Machebouf, et. al., 92 U. S. 418.

In any event, Donovan was authorized by his power to convey when Scott Boyd and Lamaster had effected a sale. No finding is made that this conveyance was not made pursuant to such sale, and the plaintiff in error had a right in a law to presume that every condition necessary to the valid execution of the power exist. ed. "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by compar. ing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding upon the constituents, as to all persons dealing in good good faith with the agent; such persons are not bound to inquire into the facts *aliumde*.

President &c. vs Conner, 37 N. Y. 320.

The conveyance by Donovan cannot be attacked for fraud in an action at law.

Walker us Kynett, 32 Ia. 524.

Bagnell vs Broderick, 13 Pet. 450.

Johnson vs Christian, 128 U. S. 318.

"That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself at the time

of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary, and so familiar to the profession, as to render unnecessary the citation of authority in support of them. Such authority may, however, be seen in the case of Goodtitle vs Jones, 7 T. R 49, of Deo vs Wroot, 5 east 132; and of Roe vs Reade, 9 T. R. 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title."

Term vs Holme, 21 How. 418.

Montejo vs Owen, 14 Blachford 324.

Here there was no restraint or limitation on the face of the power. Nothing to apprise one dealing with the attorney or the title conveyed by him, that the concurrence of any other person or persons, was requisite to enable him to convey.

It does not appear from the findings that the relation of Scott Boyd and Lamaster to the Donovan power of attorney appeared anywhere upon a public record from which the plaintiff in error or his grantors would have been put upon enquiry. The case therefore falls within the familiar rule that an agent has all the power which appears to be conferred upon him, and that as to persons dealing with him upon the faith of such appearance, these apparent powers cannot be limited by any secret intent or instruction by his pricipal. We insist that proof that such a limitation existed, that the grantors of the plaintiff in error knew of it, or that the concnrrence of Scott Boyd and Lamaster was fraudulently procured, can only be pertinent in an

action in equity in which the wrongs shall be distinctly charged against the parties connected therewith by appropriate pleadings. That if ejectment can be maintained in this case over the title of plaintiff in error, it can be maintained in the Federal Court in any case where the plaintiff has the equitable title or the stronger equity. The Circuit Court in its opinion virtually concedes that equity is the proper remedy. The opinion says (Record 24): "It may be that the plaintiff's remedy is in a court of Equity, and in view of the fact that the defendants have paid the taxes for so many years, it is obvious that full protection to the rights of all the parties can be most successfully secured in a court of equity." After this concession and without a single precedent in the whole history of litigation, the Circuit Judge lifts the remedy by ejectment over *three separate and distinct chains of legal title*, and awards recovery on a supposed superior equity.

V.

It is contended that the circuit court erred in holding that the plaintiff in error took no title under the tax deed of Dec. 15th, 1871. So far as appears from the findings of the jury, the tax deed executed and delivered to Nelson C. Brock on the 15th day of December, 1871, as found in the 18th paragraph of the jury's special verdict, is absolutely without spot or blemish. There is no finding of the jury whereon the circuit court could have based its opinion (Record, 25), that this deed did not have attached thereto the imprint of an official seal of the county treasurer, or that the county treasurer did not possess an official seal at the time of its execution. And no presumptions of such facts can be indulged. But if such had been the find-

ing, we insist that the imprint of an official seal of the county treasurer was not required to make a tax deed valid under the revenue act, as it existed at the date of the execution of this deed, December 15th, 1871, as reference to the statutes then in force will clearly show.

The first paragraph of sec. 60, revenue act, 1860, vol. 1, complete session laws of Nebraska 740, provides, that, "such conveyance shall be executed by the county treasurer, *under his hand and seal.*" The supreme court of the state of Nebraska held in Gue vs Jones, 25th Neb. 634, that the seal referred to in the forgoing act, was an official seal of the county treasurer. The uncertainty of the meaning that should be given to the use of the word *seal* in that act must have been early called to the attention of the Nebraska legislature, as also the further fact that no official seal was provided for the office of county treasurer any where in the statutes, nor yet, what should be the nature of such a seal, and that the county clerk was the custodian of the only official seal of the county, because the legislature of 1864 remodelled and expressly repealed the act of 1860 from which the forgoing paragraph is quoted. In the first paragraph of section 72, revenue act, 1864, vol. 1. complete session laws of Nebraska, 864, the legislature use the following language as to the execution by the treasurer of a tax deed in lieu of that above quoted from sec. 60 of the act of 1860, viz.: "Such conveyances shall be executed by the county treasurer *under his hand* and the execution thereof shall be *attested by the county clerk, with the county seal.*" The act of 1864 was amended in 1866, but this clause quoted from the act of 1864 remained unchanged in the act of 1866, sec. 72, vol. 2, complete session laws of Nebraska 111. The revenue act of 1866, was repealed by the

revenue act of 1869, but the clause quoted from act of 1864 providing for the execution of a tax deed was continued in its exact language. Sec. 68 gen. statutes of Nebraska, 923. The revenue act of 1869, including the manner in which the county treasurer should execute a tax deed as quoted, remained in force until 1879, when the act of 1869 was repealed, and the manner in which the county treasurer should execute a tax deed as theretofore existing was changed so as to indicate that the county treasurer was thereafter required to accompany the execution of a tax deed with the impress of an official seal. Sec. 127 compiled statutes, 1885, of Nebraska, 513. The first clause of this section proviees "the deed so made by the county treasurer under the *official seal* of his office," etc. The fact that the act of 1360 provides that "such conveyance (tax deed) shall be executed by the county treasurer *under his hand and seal*," and that the act of 1864 repealed the act of 1860, and provided that "such conveyances shall be executed by the county treasurer *under his hand*, and the execution thereof shall be attested by the county clerk with the county seal," which last quoted language was continued in force as the legislative expression throughout all the revenue acts from 1864 to 1879, is conclusive evidence that the legislative intent from 1864 to 1879 was that no official seal was required to accompany the signature of the county treasurer in the execution of a tax deed.

By section 104 of the revenue act of 1869, general statutes of Nebraska, 932, the act under which the deed in question was executed, a tax deed is made prima facie evidence of the regularity of every step leading up to its execution and delivery, which section is too

long to quote here. Section 105 same act, gen. stat. 933, provides that "any person or persons, or county, purchasing any lands or town lots at any public or private sale for taxes levied on lands sold under the provisions of this act, shall after a lapse of three years from the time of recording the treasurer's deed therefor, acquire a complete and perfect title thereto, and all persons claiming title to any such lands or lots, shall, after the lapse of three years from said date be debarred from commencing or sustaining any action in any court of this state to recover possession of the same, and the courts of this state are hereby prohibited from entertaining or sustaining any such action." That the deed in question was followed by the requisite possession to give the plaintiff in error the benefit of this section is made conclusive by the findings.

The 23rd paragraph of the jury's verdict shows that the plaintiff in error and his grantors have paid the taxes on the land in controversy since it was patented by the government, and where the title under the tax deed fails the purchaser and his grantees have a statutory lien on the premises that may be forclosed as a mortgage. See

Merriam vs Hemple, 17 Neb. 345, where the statute is quoted and construed. If the deed fails to convey a valid title, still the plaintiff in error would be in possession with a valid lien. In other words, possession with an interest, and like a mortgagee in possession, ejectment will not lie.

Section 6 of the code of civil procedure provides, that "an action for the recovery of the title or possession of lands, tenements or heriditaments can only be brought within ten years after the cause of such action shall

have accrued." A tax deed even void upon its face is sufficient color of title to support an adverse possession to the property therein described. Gatling vs Lane, 17 Neb. 77. Properly construed the findings of the jury establish an open, notorious, uninterrupted adverse possession of the premises in controversy in the plaintiff in error and his grantors for the full period of the statute. There would be no doubt about this whatever, but for the use of the phrase "*mixed possession*" in the findings. That the jury misapprehended the *legal* significance of this phrase, and used it in an entirely different and special sense an annalysis of the findings clearly establish.

The jury evidently understood the term to be properly applied, not to a possession mixed with that of adverse claimants alone, but as signifying a confused intermingling of possessions among those claiming under the same right.

The lands in controversy are all comprised in forty acres constituting the northeast quarter of the southwest quarter of section 24, town 10, range 6. The possession referred to in paragraph 10th, of findings relates solely to the west half of the southwest quarter, 24-10-6, which does not embrace the premises in controversy at all, and as to this west half alone, the jury find that there was a mixed possession between rival claimants. The fact that the jury expressly so, find as to the west half, and not as to the tract in dispute, acquires significance from the circumstance that they find this character to have attached to this tract during the whole ten years prior to the bringing of the action, while as to the tract in dispute, although the jury used the term "*mixed possession*," they find in the 11th para-

graph that up to the year 1876, or within eight years of the beginning of the suit, it was "open, vacant and unoccupied, except by the city as a pest house, and was used as a common." It was this tract that was covered by the tax deed of December 15th, 1871. But by the 35th paragraph the jury find that one Hickman entered into the possession of the tract in dispute in 1873, as sub-lessee of Boggs, a lessee of Brock under the tax deed, paid rent for the same and continued in its occupancy for about two years. By the 25th paragraph of the special verdict, it is found that S. W. Little entered upon the tract in 1876, at the termination of the period mentioned in the 11th paragraph, at which time, it is found by the 21st and 22d paragraphs that Boggs and his lessee, who it is said had "down to that time exercised mixed possessions of said premises, yielded their mixed possessions to said Little," and that said Little continued in such "mixed possession," erecting wind mills, fencing, improving and planting the same to trees and hedges (25th paragraph) until he turned the same over to his grantees.

Now the question is, with whom or how was the possion of the tract in dispute mixed. It is wholly distinct from the other tracts mentioned, was held by instruments constituting at least color of title, describing it, and not describing the other tracts and no one representing the the defendant in error's claim of title is found to have ever been in possession of it or any portion of it. Is it not a reasonable construction that if the jury had intended to find that the defendant's possession of this tract was interupted they would have done so distinctly, as in case of the tract described in the 10th paragraph. That the use of the word mixed

was not meant to signify such interruption or that the premises were held in parts by rival claimants, is further shown by the use of this term in the 38th paragraph in which they say Samuel W. Little delivered to plaintiff in error the mixed possession of the premises in controversy, "and that the said John C. Deputron thence and hitherto has held the mixed possession of the same." The only meaning they could have had in this instance is that he occupied a portion of the 40 acres in dispute, the remainder of which was occupied by the other grantees of S. W. Little.

So again the jury say in the 24th paragraph that on or about the 9th of May, 1873, Charles T. Boggs subleased the north half of the south west quarter of the section, which includes the same in suit, to one D. A. Gilbert, who on or about that date "entered upon the mixed possession of the same" etc., "*all the said north half of said south west quarter being at the time he entered therein wholly vacant and unoccupied lands.*" With whom then was his possession mixed? Not with the grantors of defendant in error, because no entry was made by them or on their behalf upon any portion of this north half of the quarter section, nor was the Scott, Boyd and Lamaster contract entered into until nearly a year later. So the jury must have intended to be understood as saying that Gilbert's possession, which they say was continued until he turned it over to Little in 1878, was "mixed" with that of his lessor Boggs and the latter's other lessees including, perhaps Hickman, who at the same date took possession of the then hitherto vacant lands now in dispute. This possession by Gilbert continued until 1878 when he yielded, to Little who had taken prior possession of part of the tract

and therefore, in the opinion of the jury further "mixed" Gilbert's possession with his own. And finally as to the north half of the quarter section, which includes all the land in dispute, the jruy find 36th paragraph of the verdict.

"That from May 31, 1874, continuously down to the time of the commencement of this suit, June 14, 1884, Charles T. Boggs and Samuel W. Little, and his and their lessees and grantees, under claim of title thereto held *mixed possession* of all of the north half of the southwest quarter of section 34, town 10, range 6 east, *and no other person entered thereon under claim of title to any part thereof.*" There, therefore, could have been no mixing of the possession of this tract between rival claimants. The entry by Gco. Smith under the defendant in errors grantor (paragraph 34 of the verdict) was upon the southwest quarter of the quarter section, and not upon any lands covered by the tax deed of Dec. 15th, 1871, or the leases to Gilbert and Hickman, which lands were held by a claim of title distinct and separate both in its inception and in the chain connecting it with the plaintiff in error, from that upon which this entry of Smith's was made. The Scott, Boyd and Lamaster survey was completed more than ten years before the beginning of this suits.

"Where the purchaser of a lot upon receiving a deed therefore, erects a building thereon and enters into possession, and afterwards sells and conveys the premises, a number of transfers of the property being thereafter made, and the building at times being vacant, but no interruption by an adverse claim to the title of the occupant. *Held* that the possession was

continuous and after the expiration of ten years the occupant possessed the fee.

Possession may be taken if one comes in under the other and the possessory estates are connected and continued."

Stettinsche vs. Lamb, 18 Neb. 619.

Lea vs Polk Co. Copper Co. 21 How., 493.

The tax deed December 15th, 1871, for the N. E. of S. W. 24-10-6 was issued to Nelson C. Brock, C. T. Boggs held as lessee under Brock (19th and 20th paragraphs special verdict). Gilbert and Hickman were the sub-lessees of Boggs. (Special verdict paragraphs 24th, 35th and 36th). Brock conveyed to S. W. Little May 18th, 2874. (23rd paragraph special verdict). Little is the grantor of plaintiff in error. Boggs yielded his possession to Little at the expiration of his lease from Brock. (22d paragraph verdict.)

It does not appear from the findings that any claimant hostile to the title of the plaintiff in error and his grantors at any time entered, or was upon any portion of the north east quarter of the south west quarter or the land in question subsequent to May 31st, 1874, or more than ten years priorto the commencement of this suit.

VI.

Our last assignment of error is that the premises described in the judgment is not the property sought to be recovered in the petition nor is the variance aided by the findings.

The petition alleges that the defendant in error is the owner and entitled to the possession of the west half of the north-east quarter of the south-west quarter

of section 24,-10,-6, (Record 1). The judgement awards the defendant in error" a part of the north-east quarter of the south-west quarter of section 24,-10,-6, and being the premises in dispute, and described, meted and bounded as follows viz: Beginning at a point in the centre of R street in said city of Lincoln, one hundred and fifty feet (150 ft.) east of the east line of seventeenth (17th.) street, thence east along the centre of R street six hundred (600) feet to the centre of nineteenth (19th) street; thence at right angles with R street, fourteen hundred (1400) feet; thence west parallel with R street seven hundred and fifty (750) feet to west line of the north-east quarter of the south-west quarter of said section twenty four (24) thence south along the west line of said north-east quarter of the south-west quarter of section twenty four (24) twelve hundred (1200) feet to the northwest corner of Leighton tract; thence east along Leighton's north line one hundred and fifty (150) feet to Leighton's northeast corner; thence south along Leighton's east line two hundred (200) feet to the place of beginning."

After making forty-one special findings the jury concluded their verdict with the following words: "If the court is of the opinion that on these facts the plaintiff is entitled to possession of the property in dispute, then we find for the plaintiff." The pleadings determine the property in dispute, and show it to be a governmental subdivision containing twenty acres, in form a rectangle eighty rods, or 1,320 feet long by forty rods, or 660 feet wide. The judgment describes an irregular tract the full sides of which are 1,400 feet in length north and south by 750 feet in wedth east and west.

In other words, the judgment includes two strips of

land, one 1,400x200 feet and one 600x80 feet, containing more than 3 1-3 acres that can under no circumstances be included within the premises put in controversy by the petition in this suit.

It is not possible to say, from the record, that any part of the premises awarded is the property or within the property described in the petition. The awarded property contains more than twenty-three and four-tenth acres, yet it passes around a block of ground 150 x200 feet, or about three-fourths of an acre which is necessary to complete the rectangle that would be formed by the award.

The property of the plaintiff in error, in that immediate vicinity was not confined to the property put in controversy by the pleadings, nor to property the title of which was within the chain of title shown by defendant in error. According to the values made in the findings, the judgment in the case awards to the defendant in error property of the plaintiff in error in excess of that claimed in the petition, and that within her chain of title of the value of $10,000.

It is a familiar rule of law that the findings of fact and judgment must conform to the pleadings.

Lipp vs Horbach, 12 Neb. 371.

Graham vs R. R. Co., 3 Wall. 704.

Insurance Co. vs Boykin, 12 Wall. 433.

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IN THE

Supreme Court.

—— OF THE ——

UNITED STATES,

JOHN C. DEPUTRON,
Plaintiff in Error.
vs.
ROWENA YOUNG,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

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Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

—OF THE—

United States

OCTOBER TERM, 1889.

NO. 1151.

JOHN C. DEPUTRON,
Plaintiff in Error.
vs.
ROWENA YOUNG,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

This Court Has the Same Right to Review the Jurisdictional Order of the Circuit Court Refusing to Dismiss under Section 5 of the Act of March 3d, 1875, that it had prior to the passage of the Act of March 3, 1887.

At pages 4 to 7 inclusive, of the brief of defendant in error, it is attempted to be maintained,

FIRST—That this court has no jurisdiction to review the order of the Circuit Court overruling an application to dismiss for want of jurisdiction, because the last clause of Section 5 of the Act of March 3d, 1875, providing for review in this court on writ of error or appeal, applies only to cases where the Circuit Court has dismissed or remanded the case from that court.

On this proposition we are disposed to agree with counsel for defendant in error. It is apparent from the wording of the last clause of Section 5 of the Act of March 3d, 1875, that the review there referred to is confined to orders dismissing or remanding cases from the Circuit Court and has no reference to reviews where the Circuit Court refuses to dismiss, as in the case at bar. This express provision permitting writs of error or appeal from an interlocutory order of the Circuit Court was necessary to enable this court to review such orders; because this court had theretofore been confined to the review of cases coming up on final judgment only.

But there is a marked distinction between the power of this court to review where the case is an appeal or writ of error from an interlocutory order of the Circuit Court denying its jurisdiction and where the order of the Circuit Court refuses to dismiss, and holds the case which passes to final judgment or decree, and the order refusing to dismiss is made a part of the record in the principal case which is brought to this court for review.

SECOND—It is contended by counsel for defendant in error (brief p. 5 to 11) that the only provision for a review in this court of an order of the Circuit Court re-

fusing to dismiss for want of jurisdiction under the Act of March 3d, 1875, is the last clause of Section 5 of said Act. And that said last clause being expressly repealed by Section 6 of the Act of March 3d, 1887, all right of review in this court of the orders of the Circuit Court refusing to dismiss, ceased to exist with said repeal.

If the first contention of counsel for defendant in error herein referred to is correct which we concede, then if a right of review in this court of the orders of the Circuit Court refusing to dismiss for want of jurisdiction, existed prior to the Act of March 3d, 1887, it still exists.

It is conceded that Section 5 of the Act of March 3d, 1875, remains in full force and virtue, except the last clause. Therefore the duty of the Circuit Court to dismiss a suit pending in that court, when it shall be made to appear "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit had been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removeable under this Act," is just as imperative as before the Act of March 3d, 1887.

Also, as the last clause of Section 5 of the Act of March 3d, 1875, had no application whatever to orders of the Circuit Court REFUSING TO DISMISS FOR WANT OF JURISDICTION the same authority to review such orders in this court still exist as existed before the Act of March 3d, 1887. Because the repeal of a clause which gave the plaintiff in error no right of review certainly took away no right.

SECOND.

Orders of the Circuit Court erroneously entertaining jurisdiction where the question has been raised in that court at any stage of the procedings will, under the Act of March 3d, 1875, be reviewed in this court if the case passes to final judgment or decree and the jurisdictional question is brought to this court with the principal case by writ of error or appeal, whether raised by plea in abatement or not.

That portion of Section 5 of the Act of March 3d, 1875, now in force, reads as follows: "That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removeable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

By the language of this section, it will be observed that the provisions are general and applicable both to the equity and law jurisdiction of the Circuit Court.

The duty of the Circuit Court is the same whether sitting as a court of chancery or as a court of law.

No form or method of raising the question is pointed out by the language of this section in either branch of the court. The terms used are of the most comprehensive character. It does not seem to be material how it shall appear to the satisfaction of the Circuit Court. The only question is if it is made to appear. It is not necessary that it should be made to appear by the intentional act of either party, and if the court at any time or any stage of the proceedings, with or without application of either party, is apprised that its jurisdiction has been wrongfully invoked, it is the duty of the court to dismiss. Nor is it left to the discretion of the Circuit Court, the terms of the act place it entirely beyond discretion, and when it is once made to appear that either of the parties to said suit has been improperly or collusively joined, the Circuit Court is directed by arbitrary terms to proceed no further therein, but to dismiss the suit. And if the Circuit Court shall refuse to dismiss, when the evidence shows that the case was collusively brought, this court will review its order and correct the error.

It is purely discretionary, however, with the Circuit Court, if doubt is suggested that its powers have been improperly invoked how the question shall be raised, or the court be advised in the premises. Certainly the practice has not been uniform, since the adoption of the Act of March 3d, 1875, in the method of raising the question. This court has uniformly disregarded the form and given effect to the intended and comprehensive substance of the act. We will now proceed to examine some of the authorities touching the method in which the question has been raised and the reviews thereof in this court.

The question here raised came under review in the case of Williams vs. Nottawa, 104 U. S. 209-211, which was a suit at law. It does not appear clearly from the case as reported whether the issue was raised in the plea to the merits or not, but it is clear that it was not raised by a plea in abatement. The evidence from which it appeared that the suit did not really and substantially involve a controversy of which the Circuit Court might take cognizance of the majority of the bonds put in issue, seems to have been brought out on the trial of the merits of the case. In the opinion the court says, touching the manner in which the jurisdiction should be questioned under the Act of 1875 at p. 211:

"But whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, congress was specially careful to guard against collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared."

When the jurisdiction of the circuit court, in a law case, is questioned on motion to remand and the motion denied, and the case goes to final judgment and is removed to this court on writ of error, the question of jurisdiction will be reviewed by this court on its own motion without suggestion from either party.

This is wholly inconsistent with the theory that a plea in abatement is necessary and that the jurisdictional facts must be passed upon by a jury.

See M. C. & L. M. Ry. Co. vs. Swan, 111 U. S. 382, where the court says: "It is true that the plaintiffs below against whose objection the error was committed, does not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it, but the rule springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court of its own motion, to deny its own jurisdiction, and in the exercise of appellate power, that of all other courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it, is called to act. *On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.*"

See also Metcalf vs. Watertown, 128 U. S. 586.

In Farmington vs. Pillsbury, 114 U. S. 138, 144, a law case; where the answer alleged that the plaintiff was not a bona fide holder of the coupons sued upon, but that they were placed in the hands of plaintiff collusively. The case was tried to the court without the intervention of a jury and special findings made, which came into this court upon a certificate of division. This court says on the question of practice under the Act of March 3, 1875, at p. 144: "The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown upon the face of the record, to be taken by plea in abatement before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of apparent parties."

The jurisdiction of this court and the circuit court will be first raised by this court on its own motion if necessary in a law case where it does not affirmatively appear from the record that the case was one properly cognizable by the Federal courts.

Grace vs. Am. Central Ins. Co., 109 U. S. 283.
Hilton vs. Dickinson, 108 U. S. 168.
Cameron vs. Hodges, 127 U. S. 325.

But in no case has this question been more fully considered than in Morris vs. Gilmer, 129 U. S. 315. This was a bill in equity. The pleadings contained the requisite allegations of diverse citizenship. The plea in bar of a decree of the state court had been overruled and issues made upon the merits. On the 17th day of November, 1887, by leave of court a motion was filed for dismissal on the ground that the suit did not really and substantially involve a controversy between citizens of different states. The motion was based on two affidavits and one of the plaintiff's depositions on the merits. It will be observed the jurisdictional question was not raised until after the passage of the Act of March 3d, 1887. The motion was denied by the circuit court. Subsequently the case went to final decree, giving the plaintiff the relief prayed, as in the case at bar. The ruling of the circuit court on the motion was on different evidence and different issues from that on the merits. The order of the circuit court on the jurisdictional issue was brought to this court with the principal case on merits. By reference to the memorandum of appellee's brief, found in the reported case, at pages 322 and 323, it will be seen that the identical questions here raised by counsel for defendant in error were interposed in that case to a review by this court of the jurisdictional issue. The court says (p. 325):

"It is true that by the words of the statute this duty (to dismiss) arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its *failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct when the case is brought here for review.*"

As to the method of raising the question and whether it must be by plea in abatement the court says at p. 326.

"While under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the circuit court the duty of dismissing a suit, if it appears at any time after it is brought and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. Williams vs. Nottawa, 104 U. S. 209, 211; Farmington vs. Pillsbury, 114 U. S. 138, 143 Little vs. Giles, 118 U. S. 596, 602. *And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the deposition taken in the cause may be used for that purpose.* However done, it should be upon due notice to the parties to be affected by the dismissal."

It is true this was an appeal from a decree on the equity side of the court. But that the court recognizes no difference in point of practice in law and equity cases is clear from the fact that the court cites in support of its holding law and equity cases indiscriminately. The

citations of Williams vs. Nottawa, 104 U. S. 209, 211 and Farmington vs. Pillsbury, 114 U. S. 143, are both law cases while Little vs. Giles, 118 U. S. 596, 602, was in equity. Nor is the method in which the jurisdictional question was raised the same in any two of these citations.

The case of Hartog vs. Memory, 116 U. S. 588, a law case was urged by counsel as being conclusive against the right of review in that case the same as in the case at bar, but the court says, p. 527: "The failure, under the peculiar circumstances disclosed it that case, [Hartog vs. Memory] to give such opportunity, was itself sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision, and cannot be regarded as authoritative. The court certainly did not intend in that case to modify or relax the rule announced in previous well-considered cases."

These authorities show that under the Act of March 3, 1875, both before and after the Act of March 3, 1887, this court will review an order of the Circuit Court overruling an objection to its jurisdiction, where the case goes to final judgment or decree and is brought here on writ of error or appeal, however, it may be made to appear to the satisfaction of the Circuit Court, whether by motion to dismiss or remand, based upon affidavits, or on the face of the record, or whether it is made to appear from the evidence on the trial of the merits, or even upon motion for a new trial if notice and opportunity is given to be heard (Hartog vs. Memory, 116 U. S. 588). In either case the right of review is equally preserved.

"If all the required cases of this court involving the

jurisdictional question under the Act of March 3, 1875, not a single one has been called to our attention where a formal plea in abatement and trial of the issues thereunder were had before the pleading to the merits, in accordance with the old rule existing anterior to the Act of 1875. To establish the rule contended for at this time would entirely overturn a large number of well-considered cases.

The principle for which we contend being therefore founded upon a long line of decisions, and the practice of the various circuits since the passage of the Act of 1875, is becoming entirely unnecessary for us to reply to proposition "D" p. 11 of brief of defendants in error and authorities thereunder cited, or to propositions "E" to p. 15 of brief of defendants in error and authorities thereunder cited.

We conclude our reply to the questions of practice [illegible] of brief of defendants in error from pages 5 to 15 inclusive, with confidence that the jurisdictional questions so raised in the Circuit Court, and so presented in this record, is in full conformity with well established practice. And that the plaintiff in error is therefore entitled to be heard on the merits of the jurisdictional question raised in the record.

[illegible]

Counsel for defendants in error in page 16 of their brief suggest that the issue this court can fix is to remand the case to the Circuit Court for a trial de novo on the issue of jurisdiction, when on the action of the Circuit Court the defendants in error had an opportunity to adduce their evidence on the subject.

We are at a loss to understand such a course in this case.

Jane V. Irwin, who virtually abandoned this property twenty-five years ago and never after paid any taxes on it. (Record 13, finding 7); and who waited to assert her claim until the energy of others had made this trackless prairie a part of a great city, is certainly not in a favorable position to complain of the laches of the plaintiff in error in not earlier raising the question of jurisdiction.

The defendant in error, who three days before the commencement of these suits, for the nominal consideration of $1000, no part of which is shown to have been paid, took a quit claim deed to this property, estimated by her to be worth $75,000, and which had since 1874 been in the possession of DeMarcus and his grantees and which "no other person occupied" or entered upon under claim of title," (Record 13, finding 9), is hardly in a situation to claim the special protection of the courts.

And, if it be true that counsel for defendant in error entered into a contract to prosecute these cases for a contingent fee of 10 per cent of the recovery, (Record 30) and then devised this scheme to transfer the controversy to the Federal Courts, and covered their tracks as well by keeping the deed from the record and concealing the whereabouts of the nominal plaintiff, that the plaintiff in error did not discover the fraud until after the trial, we submit that this court should advise them that it is never too late to deprive them of the fruits of such a practice.

ROWAN'S TITLE.

In answer to the third point made by us against the bona fides of the transfer of June 11th, 1874, counsel for defendant in error, in their brief (p. 32) contended that Rowan had always been the equitable owner of a half

Jane the naked trustee instead of to Rowena the equitable owner? But suppose that in 1894 Rowena was the equitable owner of a half interest, what reason does this furnish why Jane, the owner of the other half should convey her half of the property, estimated worth $75,000 to Rowena for the purported consideration of $1000 no part of which is shown to have been paid? Why this total want of consideration for the conveyance of Jane's interest even conceding that Rowena was the equitable owner of a part. The increase in value of Rowena's interest could furnish no consideration for a conveyance to her of the interest of her sister. The attempted explanation of counsel serves only to strengthen our position that the transfer of June 11th, 1894 was collusive and made solely for the purpose of vesting apparent jurisdiction in the Circuit Court.

STRAY CONTRACT

In answer to the fourth count in our indictment against the transfer of June 11, 1894, counsel for defendant in error in their brief say (p. 3) and to that the fact that Rowena under the advice of able counsel, entered into a contract with Stout "by which Rowena is made the absolute owner of the $1,000.00 in case the sale is consummated, instead of making for the contention that this deed of the 11th of June is collusive, really establishes, beyond reasonable controversy, the opposite." Now let us turn to the contract (Record 36) and see to whom the deferred payment is to be made. "For and in consideration of the sum of Five Hundred Dollars in hand paid by William H. H. Stout, the receipt whereof is hereby acknowledged, and the further sum of [illegible] to be paid within two years by said Stout to said Jane L. Lewis,

for costs. The record (p. 58) shows that the deposit for costs was made by Love, not Love, as erroneously stated by counsel. The $500 paid by Stout could not have been divided into thirds and deposited as contended, as the money was deposited January 7, 1889, while Stout did not part with his money until about March 25, 1889 (Record 57). Again the record (p. 58) shows that $100 out of the $500 paid by Stout was retained by the attorneys as their 20 per cent of the fruits, which would leave but $400 to divide. Again attempted explanation does not explain.

Referring again to the 100 shares of the Knox paid by Stout, counsel in their brief at page 30 say: "It further appears by the testimony of Mr. Webster that the $500 went to Mr. Hall, the attorney for Rowena, and that he, Hall, applied it in the payment of the costs in the three suits of Rowena, she thus getting the benefit of this $500.

Counsel for the defendant in error have taken occasion to criticise with some severity our synopsis of the evidence. While we did not assume to give all the testimony, which is already accessible, in the printed record, yet we may safely say that when we did pretend to give any part of the testimony we gave it truthfully and fairly. Of the above quotation from defendant's brief there is not a particle of evidence in the testimony of Mr. Webster except the following: "The money, I think, went to Mr. Hall. . . . I think the money went from Mr. Stout to Mr. Hall." We do not question that the Irwins, or their attorneys, put up the deposit for costs, and that the Irwins and their attorneys received and retained the $500 paid by Stout, but how does this show that Rowena is the real party in interest? It is time for another explanation.

relative is open to more suspicion than to a mere stranger, inasmuch as it is more likely to be intended, not as a transfer of property by which the donor puts it out of his own reach, but a feigned and collusive arrangement by which it is secretly understood that the donor shall hold the property against the claims of creditors or purchasers, and still let the donee receive benefits from it."

"It is probable that a party intending to perpetrate a fraud would look for aid and assistance to a relative rather than a stranger. When, however, relationship is coupled with secrecy in the transaction, it may, unless explained or justified, be regarded as fraudulent."

Wait on Fraudulent Conveyances, sec. 181.

Kilgore vs. Davis, 67 N. C. 184.

NO FINDING OF CITIZENSHIP

The elaborate answer of counsel for defendant is error to our argument on the branch of the case falls far short of the point made by us. We did not, nor do we now contend that under the pleadings it was necessary for the plaintiff in the court below to introduce proof of citizenship and a citizens verdict for the plaintiff in that court, if otherwise sustained by the evidence would not be objectionable because there was no finding of such citizenship.

However, where there is no citizens verdict and the judgment is based upon a verdict under the rule quite otherwise. The [illegible] in fact as well as those in law, must be included in the special verdict. It is the common practice for trial

the well defined and important distinction between the necessity of proving a fact and the necessity of including it in the special verdict.

The quotation from 107 U. S. found at page 38 of defendant in error's brief illustrates the point we make. In that case the fact was proved and there was evidence [illegible] of its existence in the special verdict itself, but the jury had not stated it as a fact. The judgment was there reversed, not because a material fact was not proved, but because it was not found as a fact in the special verdict. Although in the case at bar the jury might have been justified in finding the [illegible] proceeding from the admissions of the pleadings they have not done so, and we are the ultimate court for a finding of the fact.

If the court will not intend a fact from the other facts found in the special verdict, much less will it intend such fact from admissions found, not in the verdict, but in the pleadings.

If plaintiff's allegation and defendant's failure to deny can supply a want of a finding in a special verdict, then why would not an agreement of counsel in open court, entered upon the record, have the same effect? It is difficult to make plainer by illustration the proposition that in the absence of a general verdict the court will confine its consideration to the ultimate facts found in the special verdict and any other rule would lead to endless complications.

It is well settled that a special verdict must find all the essential facts in the case, and that it cannot be aided by intendment or a reference to [illegible] facts or matters contained [illegible]

Texas--Though such rights were assignable, and though it had been assigned, such right of action, if it existed, could not be enforced in an action of ejectment.

Wallace on Real Property Titles (p. 757) states the rule thus: "Fraud may be interposed as a defense at law in a court of law."

"In the trial of ejectment in which is involved the legal title, the legal can only be inquired into which goes to the extent of showing whether or not a deed is void, as where it was executed by a party or imposition or fraud of some kind in procuring the signature and seal."

We contend that the court must apply in this case that well settled rule of law that the right of the grantor to impeach and set aside a conveyance procured by fraud does not pass to his grantee. Even if the Irwins could upon timely application have set aside the title held by Little, it is plain that such right did not pass to their grantee, the defendant in error.

This doctrine will be applied with still greater strictness where the alleged fraud was perpetrated by the grantor's own agent or attorney-in-fact, as in the case at bar. In such case the principal alone and not his assignee or grantee of the property can impeach the act of his agent on the ground that his agent violated his instructions.

This is especially true as against DeFranca, who [illegible] September 29th, 1911. Failing to seek a conveyance from Little, whose deed had been on record since October 25th, 1911. Failing to...

How then can the defendant in error claiming under a [illegible] Deed Record [illegible] whose title was

The oldest case that we find upon this subject is in Vaughn. The case of Bowes vs. Cunningham, Vaughn [illegible]. It is said: "I must agree that a witness may prove the contents of a deed or will, as may a jury find them, the deed or will not being found or seen."

"But if a jury by their verdict shall take upon them to collect the contents of a deed, and not by the same verdict find that deed to exist, the court is not to regard the collection they have made of the substance of the deed, but the deed itself. " " " " By this verdict is both appeared what collection the jury made in their judgment of the substance of the deed to [illegible] and also what the deed wilfully was which varied from what the jury conceived it to be; for the falsehood in the deed appears to be from the day of the making of the division; but the jury collected it to be from the making. Then the courts shall not regard the collection by the jury, but the deed itself as to the commencement of the term."

In Cheshwigh vs. Williams, 1 Vernl. 47, where the jury, by special verdict found the defendant had executed the Chief Justice said it should be deemed good as a recital because it was a saying of laymen.

This court has upheld the rule we contend for.

In McArthur vs. Turner, 1 Texas 426: "A special "verdict was found by the jury upon which judgment "was to be rendered according to the opinion of the "court might be upon the construction of a certain deed "which deed was referred to and made part of the ver"dict finding of the jury, but was not contained in the "record thereof, a deed formed part of the bill of ex"ceptions taken to the opinion of the court upon a

DEFENDANT'S PURCHASE

In reply ... behalf of the defendant to cover on this point, we call attention to the only finding upon the matter that the court can regard, the finding, R. 22:

"That on the 20th day of September, 1855, Samuel W. Little and Mary D. Little, his wife, by their deed of general warranty, and for the consideration of the sum of $10,000, sold and conveyed to defendant John C. DePuy all of the north-east quarter of the south-west quarter of section 24, (description being given, which deed was recorded September 26th, 1855).

The finding upon which the defendant so much stress is merely a finding of the contract or evidence and is wholly immaterial and must be disregarded. It is as follows:

R. 22: "We find that John C. DePuy, defendant, is a brother-in-law of S. W. Little, his grantor, and that money to pay part of the consideration paid by DePuy to Little for said conveyance."

This is not a finding of fact and must be wholly disregarded.

We refer to

Campbell vs. Buckmaster, 30 Cal. 30,

in which the point was whether the register or receiver was deceived and imposed upon by the affidavit.

The finding was that "no evidence was offered by either party that the register, receiver or other officers of the United States land office were in any way deceived by the representations or affidavits of Hanger in this behalf made." The court decided this was not a finding upon this issue.

and possession was in controversy, and disposed and vested them in the year 1871.

12th. The jury also find that parties held actual possession of portions of the west half of the southeast quarter of section 24, township 11, range 4, during the years 1870 and 1871, who did not appear to be claiming by possession in either the plaintiff or defendants, or anyone under or by whom they claim.

13th. That during the years 1870, 1871 and 1872, parties holding under the grantees of plaintiff held possession of the west half of the southeast quarter of section 24, township 11, range 4.

When these are eliminated the other findings, especially the 9th, entitle the plaintiff to cause to judgment.

[redacted]

First. The law as it now exists gives this court ample power to protect its jurisdiction, from fraudulent invasion.

Second. The record clearly discloses the fact that this case does not involve a controversy wholly between citizens of different states.

Third. In the absence of a general verdict the diverse citizenship must be shown in the special verdict.

Fourth. On the special verdict the title of plaintiff in error under the conveyances is valid.

Fifth. Under the findings of the special verdict [illegible] were purchasers, and got a perfect title by the conveyances from the heirs to Stevens in fact.

In the Supreme Court of the United States

[redacted]

[redacted]

BRIEF FOR DEFENDANT IN ERROR

[redacted]

CASES.

CASE STATED 1

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(b) Section 3 of the Act of March 3 1891, giving a right to a writ of error to such [illegible] such an order to [illegible] 1

(c) After trial on the merits it was not competent for the defendant to raise the question of jurisdiction raised on motion to [illegible] 1

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1151.

JOHN C. DEPUTRON,
Plaintiff in Error,

AGAINST

ROWENA YOUNG.

Brief for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

CASE STATED.

This cause is, by stipulation, submitted to the Court on printed arguments, under Rule 20.

This was an action of ejectment brought in the Circuit Court, District of Nebraska, by Rowena Young, a citizen of Ohio, against John C. DePutron, a citizen of Nebraska, to recover the west half of the northeast quarter of the southwest quarter of Sec. 24, in T. 10, north R. 6, east of the 6th P. M., situate in Lancaster County, Nebraska (Record, p. 1).

Answer to the merits was filed and issue was regularly joined (Record, pp. 3-6). The case, with two others instituted to recover the remainder of the same forty acres, was tried to a jury, and special verdict rendered the 18th day of March, 1892 (Record, pp. 6-14).

On the filing of the special verdict both parties moved for judgment thereon, and those motions were submitted to the Court (Record, pp. 15, 16).

Pending the decision of the said motions for judgment, viz., on the 9th day of November, 1897, defendant below filed a paper entitled a "Petition," setting forth that the suit did not substantially involve a controversy within the jurisdiction of the Court (R., pp. 17-19).

The plaintiff answered the same by taking issue thereon (Record, p. 19).

The question thus presented as to the jurisdiction of the Court was determined on the 10th day of November, 1898, in the manner shown by the following record entry:

"This cause, coming on for hearing on the petition and application of the defendant to dismiss for want of jurisdiction, was tried by (by) the Court, Messrs. Hall and Wilcox appearing for the plaintiffs, and Messrs. Lamb, Ricketts and Wilson, and Harwood, Agnew and Kelly for the defendant; whereupon, after hearing the evidence and arguments of counsel, and being fully advised in the premises, it is now, on this day, ordered and adjudged by the Court that the said petition and application be and the same are hereby denied, to which ruling and order of the Court the said defendant, by his attorneys, then and there duly excepted" (Record, p. 22).

There is what is called a bill of exceptions (which, however, contains no exception by the plaintiff in

error of any kind to anything whatever) found in the Record (pp. 26-30). It is certified to contain the testimony given on the trial by the Court of the questions of fact raised as to the jurisdiction of the Court. This testimony is solely confined to this issue, and is not the testimony on the previous trial of the cause on the merits to the jury. What the testimony was on the trial on the merits to the jury does not appear. As to the trial of the question of jurisdiction there is no exception in the record, except the one in the journal entry of November 16, 1888 (above noted), to the order or judgment denying the application of the defendant to dismiss the action for want of jurisdiction (Record, p. 22). As to the trial of the merits before the jury, the record, from first to last, contains no exception whatever.

Afterwards, on the 17th of December, 1888, the Court decided the motions, theretofore submitted, of the respective parties for judgment upon the special verdict, overruling the motion of the defendant for judgment and granting the motion of the plaintiff, and adjudging that the plaintiff recover of the defendant the real property described in the petition, and costs (Record, pp. 25 and 26). The opinion of the Court (Brewer, J.), accompanying this judgment on the special findings of fact, is in the Record, pp. 22-25, and will be found to be a condensed and accurate summary of the issues, and a terse, sound and forcible statement of the grounds of the Court's opinion and judgment; it really covers every question arising in the case on the merits. The defendant prosecutes this writ of error from the judgment below in favor of the plaintiff.

Two general questions are sought to be presented on the record to this Court by the plaintiff in error. One relates to the jurisdiction of the Court below; the other to the merits of the cause as arising on the special verdict of the jury. These will be discussed in their order.

ARGUMENT.

QUESTION AS TO THE JURISDICTION OF THE CIRCUIT COURT.

I.

JURISDICTION OF THIS COURT TO REVIEW THE ORDER OF THE CIRCUIT COURT AS TO ITS JURISDICTION.

A. This Court has no jurisdiction to review a decision or order of the Circuit Court which refuses to dismiss or remand a case under Section 5 of the Act of March 3, 1875 (18 Stats., 472); its jurisdiction to review extends only to orders which dismiss or remand, not to a refusal so to do.

The Court in this case refused to dismiss the case for want of jurisdiction (Record, p. 22); and there is not now, and there never was, any statute giving a writ of error to this Court to review and reverse such an order. Writs of error, under the legislation of Congress, only lie to final judgments; and rulings and orders on interlocutory matters of this kind are not the subject of review unless there is a special statute to that effect. The only statute which gave a right in certain cases to such review as is claimed by plaintiffs in error in the

present case, was the 5th section of the Act of March 3, 1875; but the Court will observe that the provision of that statute is, that the order of the Circuit Court *dismissing or remanding* the cause to the State Court, shall be reviewable by the Supreme Court by writ of error or appeal, as the case may be. It gives a right of review to this Court *only in case the Circuit Court decides against its own jurisdiction*. If the Circuit Court *refuses to dismiss* the cause and decides in favor of its jurisdiction, the Act of March 3, 1875, Section 5 (18 Stats., 472), does not profess to extend the right of review on writ of error to such an order.

This point, so far as we have been able to discover, *has never been presented to or ruled by this Court*. If it were not for the fifth section of the Act of 1875, it is, we think, too clear for argument that the appellate power of the Court would not extend to the order here in question. If this is so, then, since that Act in terms limits the right to review to a case where the Court actually dismisses the petition, and not to a case where the Court refuses to dismiss, on what principle of construction would this Court be justified in extending the language of that statute to cases which the legislature, on the principle *expressio unius est exclusio alterius*, excluded from its terms?

II. The last paragraph of Section 5 of the Act of March 3, 1875, was repealed by the Act of March 3, 1887, Ch. 373, Sec. 6 (24 Stats., 552). Hence this Court has no jurisdiction to review the decision of the Circuit Court on the motion to dismiss.

If this clause of the Act of March 3, 1875, be con-

strued to extend to a case where the Circuit Court refused to dismiss the cause, the said clause is, by reason of its repeal, not available to the plaintiff in error. The order of the Circuit Court here sought to be reviewed was made November 16, 1888 (Record, p. 22), prior to which time, to wit, on the 3d day of March, 1887, the said clause of Section 3 giving a right to a writ of error was repealed; and this case is not within the proviso of such repeal—that is to say, such proviso should not be construed to continue this clause of Section 3 of the Act of 1875 in respect of objections which originated and were made and decided after the Act of March 3, 1887, took effect. If this order now complained of had been made before the Act of March 3, 1887, took effect, and if such order had been within the Act of 1875, Sec. 3, the order would be saved by the proviso to the Act of 1887; but, inasmuch as this objection to the jurisdiction was not made until the Act of 1887 had taken effect, the order complained of is not within the purpose and scope of the proviso. As to this cause, it is the same as if the action had been brought after the Act of 1887.

But if it shall be held that the Act of March 3, 1875, gives this Court jurisdiction to review the order made by the Circuit Court, refusing to dismiss this case, and that this right remains, notwithstanding the repeal contained in the Act of 1887, then by the express terms of the Act of 1875 the proceedings to obtain such review must be the same as are necessary to obtain a review by this Court of the judgments or orders of the Circuit Court in other cases. The Act reads:

"Shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

This is the same language that is used in Section 709 of the Revised Statutes, which provides generally for the bringing of cases which involve issues of fact before this Court for review. The method of obtaining a review by this Court is the same under both statutes. These rules have not been complied with by the plaintiff in error in this case, so as to entitle him to a review of the order made by the Circuit Court refusing to dismiss this action. This we now proceed to show.

C. After a trial of the merits by jury and the finding of a special verdict on the merits covering all the issues, and after motions by both parties for judgment on such verdict had been submitted to the Court, it was not competent for the defendant to raise the question of jurisdiction based on the alleged collusive nature of the conveyance to the plaintiff.

The proper allegation of the citizenship of the plaintiff was made in the complaint (Record, p. 1), and was not denied in the answer; it stood admitted on the record. It is too plain for argument, in view of the decisions of this Court, that, aside from Section 5 of the Act of March 3, 1875, the question of jurisdiction could not be raised in the manner attempted at that stage of the cause. The question is whether that section changed the rule. It is true that the Act of March 3, 1875, Section 5, provides that—

"if it shall appear to the satisfaction of the Circuit Court at any time after such suit has been brought that such suit does not really and substantially involve a dispute or controversy properly within the jurisdic-

tion of the Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under the act, the Circuit Court shall proceed no further therein, but shall dismiss the suit; but its order dismissing the cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be" (18 Stats., 472).

The law on this point has been stated by Chief-Justice WAITE, in *Hartog* vs. *Memory*, 116 U. S., 383, 390:

"It was well settled before the Act of 1873 that when the citizenship necessary for the jurisdiction of the Courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such plea to the jurisdiction."

Now, we insist that this rule, *as a rule for the parties*, has not been changed by the Act of 1873. If a party wishes to question the jurisdiction, he must still make his plea in abatement, and a plea to the merits waives such plea to the jurisdiction. It is true, the Court may at any time during the trial dismiss or remand the suit, if it finds that its jurisdiction is being imposed upon. But the *party* who wishes to raise a question of jurisdiction must plead the facts in abatement. This is a well known common law rule, and the Act of 1873 neither abrogated this rule nor furnished any other method by which the parties could raise the question. Therefore, as a matter of *right*, the parties can raise the question only by a plea in abatement; and this Court has no jurisdiction to review an order on a question which was raised in the Circuit Court at such a

time and in such a manner that it lay in the discretion of that Court whether even to consider it or not. This Court cannot review orders which are discretionary with the Circuit Court.

The 5th section of the Act of March 3, 1875, was enacted in connection with a great extension of the jurisdiction of the Circuit Court, and was intended for the benefit of the Court itself, to prevent its jurisdiction from being obtained by fraud. Before the Act of 1875 the Court, after a plea had been made to the merits, could not dismiss or remand a case, however clearly it might appear from the evidence that a fraud was being practised upon its jurisdiction. It was to enable the Court under such circumstances to dismiss or remand a case that the fifth section of the Act of 1875 was passed. This is the explanation and interpretation given by Chief Justice Waite in *Hartog* vs. *Memery*, *supra*. He says (p. 330):

> "*In its general scope this rule* (stated *supra*) *has not been altered by the Act of 1875*, but before that act was passed it had been held that the rule prevented the Courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the Courts of the United States *in the absence of a plea in abatement* or to the jurisdiction, and, as that act 'opened wide the door for frauds upon the jurisdiction of the Court by collusive transfers so as to make colorable parties and create cases cognizable by the Courts of the United States,' we held in *Williams* vs. *Nottawa*, 104 U. S., 209, 211, that the statute changed the rule so far as to allow the Court at any time, without plea and without motion, to 'stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered.'"

See also Everett v. Story, 89 Fed. Rep. 108.

However, the facts appearing on this record do not require us to go so far as to say that the plea to the

jurisdiction of the Federal Court will be waived by a plea or answer to the merits, as was the case previous to the Act of March 3, 1875; but, however that may be, we do submit with confidence that after the cause has been tried on its merits by a jury, without objection to the jurisdiction, and a verdict rendered, and the cause on that verdict has been submitted to and is actually before the Court for its judgment on the verdict, the Act of 1875 is not broad enough to allow and was never intended to allow the parties to interject such an issue as was here attempted at that stage of the cause. If this may be done as of *right*, it would lead to intolerable vexation, annoyance and frauds, since the party would reserve that objection until he saw that he was likely to be defeated on the merits, or until, as in this case, he had been beaten on the merits and then for the first time assail the jurisdiction of the Court. A further reason appears in the present case against allowing such an objection to be raised at the time when it was attempted, namely, that, according to the contention of the defendant below, the statute of limitation, which had not run at the time this suit was commenced, had run when the objection to the jurisdiction was made, so that it would not then have been possible to maintain a suit in the State Court for the land in question. Defendant below waited until this condition of affairs existed and then for the first time made his objection. If it is not a matter of right thus to intrude such an issue, it is at most a matter of *discretion* in the Court, the exercise of which cannot be ground of error.

The equity case of *Morris* vs. *Gilmer*, 129 U. S., 315,

and other cases referred to in the opposing brief, are not inconsistent with the point which we here present.

(D.) Inasmuch as this action was at law and the record fails to show a stipulation in writing waiving a jury in the trial of the issue of fact which was presented by the petition of the defendants for a dismissal of the case on the ground that the case was brought in the Circuit Court by collusion this Court has no jurisdiction to review the order of the Circuit Court denying the petition or application to dismiss the suit for want of jurisdiction.

The question as to the jurisdiction of the Circuit Court, even if it was properly raised, depended on the question of fact as to whether the conveyance to the plaintiff had been collusively and fraudulently made in order to give the Federal Court jurisdiction. The petition to dismiss the cause on this ground alleged that such was the fact; the answer denied it. This presented an issue of fact.

The Constitution, the general and uniform legislation of Congress touching the jurisdiction of the Federal Courts, and the Act of March 3, 1875, in relation to the jurisdiction of the Circuit Court, all provide or contemplate that questions of fact shall be tried by a jury. The Act of March 3, 1875, Ch. 137, § 3, provides that: "The trial of issues of fact in the Circuit Courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury." Prior to the Act of March 3,

1865 (Rev. Stats., Secs. 649, 700), which Act first enabled parties to obtain a review by this Court of a common law case in which an issue of fact was tried without a jury, provided the parties made and filed with the Clerk a stipulation in writing to waive a jury,—prior to this Act, it was competent for the parties to submit common law actions to the Court, or to submit to the Court the trial of an issue of fact. Cases are numerous to this effect. Since said Act of March 3, 1865, it has been decided time and time again that it is still competent to submit issues of fact to trial by the Court, *without a stipulation in writing* (Bond vs. Dustin, 112 U. S., 604, and cases cited). This the parties did as to the issues raised by the petition and answer relating to the alleged collusive deed (Record, pp. 22, 27). The record does not show or recite any stipulation in writing waiving a jury. The Court heard the evidence adduced by the defendant in support of his charge of fraud on the jurisdiction of the Court, which evidence is embodied in the record in what is misstyled a bill of exceptions, extending from page 26 to page 89. After hearing which evidence the Court refused to dismiss the suit for want of jurisdiction (Record, p. 22). There was no "exception" taken by the present plaintiff in error to any rulings in the course of the trial. The Court made no findings of fact. There was not even a motion for a new trial on the ground that the issue had been decided against the weight of evidence. The only exception by plaintiff in error anywhere found in the record is embodied in the journal entry to the effect that when the Court denied the application to dismiss the defendant then and there excepted to that ruling (Record, p. 22). By the uni-

form course of decisions of this Court prior to the Act of March 3, 1865, and since, this ruling presents no question which may be reviewed in this Court.

The following cases are on all fours with the present case on this point, and are conclusive to the effect that, inasmuch as this record fails to show a waiver of a jury by stipulation in writing filed with the Clerk, this Court has no jurisdiction to review the decision of the Circuit Court on the defendant's petition to dismiss on the ground that the jurisdiction of that Court was collusively obtained:

Flanders vs. *Tweed*, 9 Wall., 425.
Kearney vs. *Case*, 12 Wall., 275.
Gilman vs. *Illinois Tel. Co.*, 91 U. S., 614.
Madison County vs. *Warren*, 106 U. S., 622.
Alexander County vs. *Kimball*, 106 U. S., 623, note.
Read vs. *Dustin*, 112 U. S., 607, where GRAY J. cites and reviews the decisions.

In *Bowyer* vs. *Insurance Co.*, 103 U. S., 93, 96, Chief Justice WAITE, speaking of the Act of 1865, above referred to, said:

"It is now, as section 700," (of the Revised Statutes) "the only statute which provides for a review here of cases where a... issue of fact in a civil cause has been tried in the Circuit Court otherwise than by a jury."

The Act of 1865, was not complied with in the present case; hence the order of the Circuit Court refusing to dismiss the case is not subject to review by this Court. No error in that regard appears of record.

In *Gilman* vs. *Ill. and Miss. Tel. Co.*, 91 U. S., 603, 614, Mr. Justice SWAYNE said:

"The case having been submitted to the Court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows

no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. *Phillips vs. Preston*, 5 How., 278; *Campbell vs. Boyreau*, 21 *Id.*, 224; *Kelsey vs. Forsythe*, *Id.*, 86. *The proceedings not having been according to the Act of March 3, 1865, this Court has no power to examine any ruling of the Court below excepted to during the progress of the trial. Campbell vs. Boyreau, supra; Guild et al. vs. Fontin*, 18 *Id.*, 135; *Kearney vs. Case*, 12 Wall., 275; *Dickinson vs. The Planters' Bank*, 16 Id., 250."

In *County of Madison vs. Warren*, 106 U. S., 622, Chief Justice WAITE, giving the opinion, said:

"This is a case tried and determined by the Court without the intervention of a jury. The record does not show any stipulation in writing waiving a jury. The errors assigned all relate to rulings of the Court on the trial, excepted to at the time, and presented by a bill of exceptions. The rule is well settled that if a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error" (citing cases).

In *Bond vs. Dustin, supra*, Mr. Justice GRAY, giving the opinion said:

"By the Act of March 3, 1865, Ch. 86, Sec. 4, re-enacted in the Revised Statutes, it is provided that issues of fact in civil cases may be tried and determined by the Circuit Court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the Court waiving a jury; that the finding of the Court upon the facts shall have the same effect as the verdict of a jury, and that its rulings in the progress of the trial, when excepted to at the time and presented by bill of exceptions, may be reviewed by this Court upon error or appeal, 13 Stat., 501; Rev. Stat., Secs. 649, 700.

Before the passage of this statute, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury and submitted the facts to the determination of the Circuit Court upon the evidence, its judgment was valid; but that this

Court had no authority to revise its opinion upon the admission or rejection of testimony or upon any other question of law growing out of the evidence, and, therefore, when no other error appeared on the record, must affirm the judgment.

Guild vs. Frontin, 18 How., 135.
Kelsey vs. Forsyth, 21 How., 85.
Campbell vs. Boyreau, 21 How., 223."

* * * * * * *

"Since the passage of this statute, it is equally well settled by a series of decisions that this Court cannot consider the correctness of rulings at the trial of an action by the Circuit Court without a jury, unless the record shows a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. *Flanders vs. Tweed*, 9 Wall., 425; *Kearney vs. Case*, 12 Wall., 275; *Gilmore vs. Illinois and Mississippi Telegraph Co.*, 91 U. S., 603, 614; *Madison County vs. Warren*, 106, U. S., 622; *Alexander County vs. Kimball*, 106 U. S., 622, note."

E The issue of fact raised by the "petition" or application of the defendant below to dismiss and the answer thereto was tried by the Circuit Court without a jury, and that Court made a general finding in favor of the plaintiff, and there being no exception raising any question of law, such finding is conclusive, and is not a subject for review by this Court.

Plaintiff in error seeks, in this action at law and by a writ of error, to bring before this Court for review the questions of fact which were decided by the Circuit Court, and thus attempts to reverse a general finding, including mixed questions of law and fact, made by

that Court. No argument is necessary to convince this Court that such review cannot be had on a writ of error.

Section 1011 of the Revised Statutes provides:

"There shall be no reversal in the Supreme Court * * * upon a writ of error * * * for any error of fact."

Section 649 (Rev. Stat.) provides:

"The finding of the Court upon the facts, which may be either *general* or special, shall have the same effect as the verdict of a jury."

Section 700 (Rev. Stat.) provides how a *question of law* may be raised and brought before this Court for review. There is no method of bringing *questions of fact* before this Court, by writ of error for review here. Only (1) questions of *law* which arise upon *facts as found*, either by the Court or the jury below, can be brought here for review, or (2) rulings of the Court in the progress of the trial, *upon matters of law*, which are excepted to at the time and presented in a bill of exceptions, or (3) questions of law which arise upon the pleadings—only such questions of *law* can be brought here for review on writ of error.

Where, as in the present case, so far as respects the petition or application to the Circuit Court, to dismiss the case, the finding of the Court is *general* and, thus includes mixed questions of law and fact, there is no method of bringing before this Court for review the questions of law which arise upon the facts as presented by the evidence.

In the present case, as to the order upon the application to dismiss, there is, therefore, no question open

for review by this Court. The finding was *general*, in favor of plaintiff; no exceptions were taken to the rulings of the Court in the progress of the trial, and no question of law arises upon the pleadings. The following authorities are conclusive that upon this record no question arises upon the order of the Circuit Court refusing to dismiss the case which is open to review by this Court:

Norris vs. Jackson, 9 Wall., 125.
Martinton vs. Fairbanks, 112 U. S., 670,
and cases there cited.

That the foregoing views are sound under the provisions of Section 5 of the Act of March 3, 1875, here in question, is demonstrable from the very language of that section conferring appellate power in such cases upon the Supreme Court; for the express provision of this act is:

"That the order of the Circuit Court dismissing the cause shall be reviewable by the Supreme Court on * * * *writ of error or appeal*, as the case may be."

That is to say, if the order of the Circuit Court is made in an action at law, that order can only be reviewed on a writ of error. If such order is made in an equity cause, the testimony may be reviewed on appeal, as was done by this Court in the equity cause of Morris vs. Gilmer (129 U. S., 315). The language "reviewable by the Supreme Court on writ of error" *ex vi termini* implies that the order in a case at law can be reviewed in no other way, and that the error of law must appear on record in the same way that an error of law to be reviewable must appear in any other action at law. So

argument, it seems to us, can make this plainer; and we here leave the discussion.

If, however, the Court shall find that we are wrong on all the foregoing propositions, and that the Court can now re-try, as in an equity cause, the question of fact *de novo* as to whether the deed to the plaintiff was collusive, then we proceed to show, under the next head, that in point of fact the conveyance to the plaintiff was not fraudulently and collusively executed to make a cause within the jurisdiction of the Federal Court. The next point in the brief (from pp. 19 to 54) is confined to a discussion of the evidence on this subject, and to a reply to the brief of the plaintiff in error respecting it, and may be entirely omitted by the Court if it concludes that it has no right to re-examine the evidence and to re-try the question of fact found and implied in the order and judgment of the Circuit Court refusing to dismiss the action for want of jurisdiction.

THE WEAKNESS OF THE CASE presented by the plaintiff in error on the subject of the jurisdiction was such, and so manifest, that the Circuit Court declined and refused (as appears in the so-called bill of exceptions, Record, p. 39) to hear the evidence on the other side, and thereupon entered its order refusing to dismiss the cause. If this Court shall find that it can review and re-try this issue, and on such re-trial finds error, the result would be that the case would go back for trial *de novo* on this issue. This of course would

be necessary, since by the action of the Circuit Court the defendant in error had no opportunity to adduce her evidence on this subject.

II.

If this Court shall conclude that it can on this record re-try the question of fact as to the alleged collusive nature of the conveyance to the plaintiff as affecting the jurisdiction of the Court, then we maintain that on such review the conclusion and judgment of the Circuit Court that such conveyance was not collusive is well sustained by the testimony, and the ruling of the Circuit Court in this respect was correct and not erroneous.

At the time of the preparation of this argument counsel for the defendant in error had been served with the printed argument for plaintiff in error, and have it before them for comment and reply.

In entering upon an examination of the record of the facts it is well to preface it by calling attention to the care with which counsel for the plaintiff in error avoided raising the question of jurisdiction until the bar of ten years fixed for the Statute of Limitations for such cases as this, would on their theory be complete, such ten years' bar being complete at latest by the last day of the year 1886 (see Findings II and 25 of the Special Verdict, R., 9 and 11).

The question of the action being collusively brought in the name of Rowena Young was not raised in the case until November 9, 1887 (R., 16). It is seen that this action was commenced in ejectment on June 14, 1884 (R., 1), and the trial to the jury occurred March 3, 1886. The judgment was rendered December 17, 1888 (Record, p. 25).

This lapse of ten years may explain the long silence of plaintiff in error, and his present solicitude that the Court guard its jurisdiction against invasion. It was too late to bring another action when this question of jurisdiction was first started, and if this action fail, defendant, who is a volunteer under a claim of title originating, as we shall hereafter see, under a deliberate conspiracy to defraud, is safe in the possession of the fruits.

(A) Inaccuracy of the opposing brief in abstract of evidence relating to the jurisdiction of the Court.

Before entering upon the more formal discussion of the propositions contained in the brief for the plaintiff in error it is deemed proper to notice some of the inaccuracies which are found therein, touching what is disclosed in the Record in the way of questions of fact. This we do at the outset for the purpose of showing to the Court the unreliability of the plaintiff's brief on this subject.

We shall not attempt a statement of all of them, but shall set forth some as specimens.

Take first, as a specimen of the incorrectness of the brief (p. 4) as to what is disclosed by the Record of what is alleged to be the substance of the deposition of

Rowena Young, the plaintiff. This deposition is, of course, one of the most important, if not the most important in the Record (if any part of it were of any importance), by reason of its being the testimony of the party plaintiff. The testimony of this witness, as well as other testimony, shows that she is a plain, artless, unsophisticated and truthful old woman, unskilled in the ways of the world, and not suspecting the arts of the other side, in the endeavor to deceive and entrap her.

The account which the brief for plaintiff in error gives (p. 4), as embodying what it calls the substance of her testimony, amounts to this: That she was seventy years old; that the deed from her sister Jane Irwin, was made for her sole interest; that she is the real owner of the interest thereby conveyed; that the land was originally entered with money coming out of her father's estate, belonging to herself and her sister Jane; that she has never disposed of or encumbered any of the property inherited by her; that she never writes letters, but usually signs her own name; has no personal recollection as to the time when any money was sent to her sister Jane, or as to the amounts; that any moneys sent to her sister Jane since 1865 were sent by her brother William; that some strangers called on her since this suit was commenced, and talked about this property; that her sister Jane, hearing of this, went to Ohio and told Rowena that she did not like it because Rowena had not told her of this visit of the strangers; and when told what the result had been, said that she did not know as it would make any difference, as Rowena had not given an affidavit; and she cautioned her not to talk any more about it; and that

she had not. And that she had never been to Nebraska or seen the property in controversy.

Now turn to the Record, and reduce to a narrative form her testimony, as found, beginning at page 61, and it will read as follows: My name is Rowena Young; age, seventy; residence, Zanesville, Ohio. When asked whether or not there was any agreement or understanding that the deed of the land in controversy made to you (Rowena) June 10 (11), 1884, by Jane Y. Irwin, was not to be absolute, or to your sole use, she replies: "It was to my sole interest" (R., 61). To the next question, which is—"Who is the real owner of the land, or the interest in it, conveyed to you by that deed?" She replies, "I am." In answer to the question for what reason or how the land came to be conveyed to her, she answers: "I had been advancing her (Jane) money, and had a share in it, besides, myself, and the land I took to pay for what she owed me" (R., 61). In answer to the question how her share or interest in the land arose, she replies: "The land was entered with money coming out of my father's estate, belonging in part to me, being the joint fund of Jane and myself." In answer to the question whether strangers had been to talk to her since this ejectment suit was commenced, and asking her who they claimed to be, and what was said, the substance of her reply (bottom, p. 61, and top of 62, R.), is, that

"she did not know who the first one that came was, but he said he came from Spangler and Finley's; wanted to trade property in Zanesville for land in Nebraska; that she told him that she did not want to trade the land for any more property; we had more here than paid well; that he (her inquisitor), wanted to know what she valued her Nebraska land at. Her reply was $75,000. He said that was too high; did not calculate to go

higher than four or five thousand dollars; said he was going there and would like to have some of the land very much. That she said, perhaps, if he went to her attorney, he could get some of that other land. That was all that was said and he went away."

She further adds, in the same answer,

"There was one other who came. He claimed to come from Pennsylvania; was there in the morning and talked to her brother; came in the evening and saw the witness; was a good deal said; he wanted to know how I came by that land. I told him I had always had an interest in it, since it was bought; and he said he came here to buy property, but believed he would go West, and see if he could not do better, and he would go, and, if he could not suit himself, he would come back and see if he could not make a bargain with us. I told him he need not do that, because we would not sell. I cannot remember anything else. He talked too much to me; I never had an idea that he was one of them out there."

In answer to the question in cross-examination (R. 66, fol. 108):

"You never have claimed all this land in controversy, but merely that you are interested in it as well as Mrs. Irwin?"

She says,

"A. I count that I have got her share out."

In this connection, as appropriately as anywhere else, we may allude to the artifice which was adopted by one of the counsel for plaintiff in error to entrap the defendant in error. The second person, who is alluded to in this answer by Bowens (Record, pp. 42-43), as coming to her, and claiming to come from Pennsylvania, was the attorney whose testimony will be found (R., 30 *et seq.*) where he testifies that he was one of the

persons who so visited the witness. It will be seen, also (R. 58, folio 95), in the caption of the deposition of three witnesses examined on this occasion at Zanesville, that the attorney was the party who was present at the taking of Rowena's deposition; and that he carefully avoided, in his cross-examination, all allusion to the fact that he was that second person from Pennsylvania, who visited Rowena; and, also, that in his cross-examination of Rowena, he avoids all allusion to the conversation he himself had with this witness previously to this deposition, and at the time he came to her as "from Pennsylvania"; and, after so omitting, by cross-examination of Rowena, to give her opportunity to have her say about his version of the conversation, he then goes upon the stand and gives that version himself (R. 30 and 31), in which version he is not sustained by his own witness Atwell, whose testimony is in the Record, at page 27, folios 44–46.

In the most important fact in the case, to wit: the length of her ownership of her interest in the land, Atwell (R. 28, fol. 45) swears that she told him in the morning of the same day of her conversation with this attorney that she got it (her interest in the land) by original entry, from the Government fifteen years ago.

And, as throwing light upon the value of the evidence, by the attorney, of the conversation with Rowena, it may be here remarked once for all, that said attorney is presented to the Court as—first, an attorney of record, in a case between Rowena Young and his client, going to her for the purpose of obtaining evidence against herself without her being aware of the object of the visit; and, second, that he goes to her with the untruthful statement upon his lips that he comes as

a Pennsylvanian, desiring to buy or trade for her (Rowena's) land; and, third, that he afterwards cross-examines her, when being examined as a witness, without disclosing to her in his cross-examination that he was "the man from Pennsylvania" who had interviewed her, and without, so far as the record shows (and which is the fact) making known to Mr. J. R. Webster, her counsel, taking the deposition (R., 58) that he was "the man from Pennsylvania"; and afterwards, as already remarked, he goes upon the stand and gives his testimony of this decoy interview with Rowena.

The caution with which Courts receive and act upon the evidence of detectives is proverbial; and a better illustration of the necessity for this cannot be found than this case presents of an attorney playing the role of an amateur detective, with the deliberate purpose to testify in a case in which he is counsel. It is somewhat remarkable that plaintiff would talk so differently to two parties, Atwell and Wilson, both witnesses produced by the defendant below, when inquiring on the same day about the same property.

It is to be remembered that this Court cannot have before it the witnesses themselves. That element of evidence cannot be preserved in a record.

If what Atwell says is true, what the attorney says is not.

The following things are in the plaintiff's testimony, which the abstract of the plaintiff in error leaves out:

1. This guileful visit of the attorney is wholly omitted, but is in her testimony.

2. This, the most vital part of her deposition (R. 61),

is totally omitted from the abstract, to wit, " State for what reason, or how, the land came to be conveyed to you ?" A. " *I had been advancing her money, and had a share in it, besides, myself, and the land I took to pay for what she owed me.*"

As another specimen of inaccurate abstracting from the record of important testimony, take the abstract of Atwell's testimony, (page 5 of the Brief of plaintiff in error). The abstract there makes no mention of the following, the most material part, for the defendant in error, of Atwell's entire evidence. At page 28, fol. 45, of the Record, Atwell says : " She said she got it by original entry from the Government fifteen years ago."

The abstract of the deposition of William P. Young, brother of Rowena, defendant in error, is on top page 4. It omits to notice the following material things contained in the deposition of William P. (found at page 58 *et seq* of the Record). William swears, when asked for his knowledge of the financial ability of his sister Rowena, as follows : " So far as I can answer, I know she (Rowena), has had money out on interest ever since her father's death, thirty-three years ago next January, and even previous thereto."

The abstract also omits to notice the fact that William swore, that it was the " common understanding in the family " that such money was sent.

The abstract (on page 4 of the brief) also omits to state, what is sworn to by William P., in answer to the question what he knows as to Jane's owing Rowena, that he " knew before, from what I had heard, that Rowena's money had been used in the entry of this land."

The abstract (at page 4) also omits, what appears on

R., page 59, folio 96, that William P. swore that it was his impression that the conversation, between Jane and Rowena, about the making of the deed to Rowena, for the forty acres, was before the deed of June 11th, 1884, was, in fact, made, and it omits, also, to notice the fact that William swears that the object and the purpose of that deed, as stated in this conversation between Rowena and Jane, "was conveyed in consideration of sister Rowena's money, as I recollect."

These parts, omitted from the abstract, are again, the most material part of the deposition. In short we protest against this abstract being accepted by the Court as correct, if the Court shall have any occasion (as we think it will not) to examine and weigh *de novo* the evidence on the trial of the issue of fact as to the jurisdiction of the Court.

If this Court cannot retry the question of fact with a view to see whether the Circuit Court decided against the weight of evidence and, therefore, erred, then all that follows in this Brief down to the next Point (*infra*, p. 54) is immaterial and may be skipped by the Court.

PROPOSITIONS OF FACT; OR ALLEGED INDICIA OF COLLUSIVE TRANSFER AS BEARING UPON THE QUESTION OF JURISDICTION.

We now turn to an examination, in the light of the record, of some of the propositions of fact relied on by the plaintiff in error, as defeating the jurisdiction of the Court, under Section 5, of the Act of March 3, 1875 (18 Stats., 472), relating to suits collusively brought in the Circuit Court.

I. The first proposition of fact that we care to notice

in the opposing brief, and bearing upon the question of alleged collusive institution of the suit in the Circuit Court, is, regarding the question of real interest in or ownership on the part of Rowena of the land in suit, and the question of assertion by her of such interest. The position of the opposing brief on this point is, in substance, that she (Rowena) never had, or claimed, or had knowledge of, any such interest.

As to the time when Rowena first claimed that she had acquired the ownership of this land, it will be seen in the passage of evidence already quoted from witness W. J. Atwell (R., 28) that she, to Atwell, in a conversation that occurred about May 17, 1887, and six months before the question of the collusive bringing of this suit was started by plaintiff in error, and, therefore, before Rowena could have known the importance of the *bona fides* of the deed to her of the 11th of June, 1884, asserted the following, quoted from Atwell: "She (Rowena) said that she got it by original entry from the Government fifteen years ago."

So, on this point of ownership, it will be observed, her brother William testifies, speaking of the time when the deed to Rowena was made by her sister, that he "knew before, from what I had heard, that Rowena's money had been used in the entry of this land." And that the land "was conveyed in consideration of his sister Rowena's money, as I recollect" (R., 59, fol. 96).

Then, on the same matter, as to the character of her interest in the land, observe that she swears positively that the conveyance to her by the deed of the 11th of June, 1884, was a real, *bona fide* conveyance of an absolute interest to her. This appears by the following question and answer (fol. 99, R., 61):

"Q. State whether or not there was any agreement or understanding that the deed of the land in controversy made to you June 10th (11), 1884, by Jane Y. Irwin, was not to be absolute or to your sole interest?" "A. It was to my sole interest."

"Q. Who is the real owner of the land, or the interest in it, conveyed to you by that deed?" "A. I am."

"Q. State for what reason or how the land came to be conveyed to you?" "A. I had been advancing her money, and had a share in it, besides, myself, and the land I took to pay for what she owed me."

"Q. You say you had a share in it yourself; please state how that arose?" "A. The land was entered with money coming out of my father's estate, belonging in part to me, being the joint fund of Jane and myself."

In answer to the question in cross-examination (R. 66, folio 108), "You never have claimed all this land in controversy, but merely that you are interested in it as well as Mrs. Irwin," she says, A. "I count that I have got her share out."

Then, at folio 101, R. 62, in narrating her conversation with "the man from Pennsylvania," she says: "I told him I had always had an interest in it since it was bought."

Then, at the bottom of page 62, fol. 102 of the Record, when asked how much money she had on hand, or loaned, at the time of her father's death, she says: "I guess I had about a thousand dollars;" and gives the names of Welch and Miller who had some of her money.

She becomes somewhat indignant at being asked by Wilson how she got the thousand dollars; and replies (fol. 103, R. 63): "Well, that is a pretty question. I got it honest. My father gave it to me from time to time, and I always had been saving."

Then, at folio 103, R. 63: "Q. You have kept this money out at interest all the time, or reloaned it whenever it was paid in, have you not?" "A. Yes, sir."

And also at R, 67, folio 109: "Before father's death this [home] place had been kept as a hotel for 25 years. After father's death my brother and I kept it as a hotel."

At folio 106, R. 65, it will be seen that Rowena testifies, that a portion of her father's land, which descended to his children, was still owned by herself, Rowena, her brother William and Mrs. Irwin; and this fact if it were not true, could have been, but it was not, contradicted. So that here is an interest still held in common by Rowena and her sister Jane in the home farm, such as she swears existed in the Nebraska purchase of the 120 acres in 1862, in the name of her sister Jane, but which she says was really for the benefit of herself and Jane.

That this land was entered in the name of her sister in 1862, appears in the following words at fol. 26, R. 17, as alleged by DePutron in his petition to dismiss the suit as collusive: "The land in controversy herein, with other lands, amounting in all to 120 acres, were patented to the said Jane Y. Irwin on the 15th of December, 1862."

We submit now, in view of this affirmative testimony from Rowena Young and William P. Young, that the testimony establishes clearly, and, in the absence of countervailing proof, conclusively, that this deed of June 11th, 1884, was honestly made, for and in consideration of the ownership that had attached in the 120 acres of land from the time of said purchase in 1862; and that it was in the highest and best sense

honest, because in the nature of a setting off or partition, between two sisters, of the sister Rowena's part of the 120 acres, to wit, the 40 acres of land, covered by the said deed of the 11th of June, 1884.

We now turn to notice some of the evidence attacking this deed. These objections are catalogued on pages 18 and 19 of the opposing brief.

The first objection is "the total want of knowledge on the part of Rowena of the condition and location of the land."

In regard to this total want of knowledge on the part of Rowena, the following things are to be observed:

1st. That she was an old woman, unused to travel; that, so far as her relations to her sister Jane were concerned, they were always agreeable and confidential. Jane and she had retained in community their interest in their father's land at Zanesville; they had confidence in each other; and there is no reason why Rowena should have in detail acquainted herself with this tract of land before it became valuable. She swears (R., 61, fol. 100) that in her talk with Atwell, on the 17th of May, 1887, she valued this land at $75,000. This indicates she then knew something about the value of the land. At folio 100 she swears that she told "the man from Pennsylvania" (defendant's attorney) "that she always had an interest in it since it was bought;" thus affirming, touching the land, the truth regarding her interest and how it arose.

2d. She swears (at fol. 104, R., 63) that she guessed the land was bought from the Government "in eighteen hundred and sixty-some," which was the truth of the matter.

3d. In Atwell's testimony (fol. 45, R., 28) he swears

that she said, that "she had some interest in the 160 acres of land at Lincoln, Nebraska." This shows that she knew about its location; swears that "she had never seen the land, and did not know just how it was located, but that her sister Jane Y. Irwin looked after it for her." She said that she did not know whether it was platted; and if it was platted, she had never seen any plat of it; but that she understood that at the time the City of Lincoln was laid out or platted this land was supposed to be worth one hundred thousand dollars. She said she had got it from the Government by original entry fifteen years ago.

Now, since it is true that her sister Jane and she were co-heirs to the estate derived from her father, and that Jane was competent to look after Rowena's interest, and had shown ability in managing her property; and, especially, as Rowena was at great distance from this land, was of feeble health, troubled with her spine, which affected her recollection, &c. (fol. 108, R., 66), why should it not have been, as Rowena swears it was, that she entrusted the care of this property to her sister Jane, especially as it never acquired any great value until the location of the capital of the State at Lincoln, in 1867?

This is, in substance, our reply to the assertion (bottom p. 18, Opposing Brief) that she was in "total want of knowledge of the situation, condition and location of this property." The allegation is wholly *not so.*

II. The next allegation of fact, going to show that Rowena had no honest interest in the land, is numbered two (near top p. 18, Opposing Brief), and is expressed by the words: "The indifference of the grantee

and the activity of the grantor, in the prosecution of the suit."

The reply to this is, in substance, the same as the reply to the preceding allegation, numbered one, on the same page of the brief.

The evidence pointed to in the brief for plaintiff in error (p. 32), as showing this indifference of the grantee, and the activity of the grantor, Jane, is the evidence of "the man from Pennsylvania." About the character of that evidence we have already remarked, so far as we care to *(supra*, p. 23 *et seq.*).

In her testimony, Rowena surely shows no indifference, but a disposition to be frank and tell the truth, and vindicate her interest. Moreover, it was impossible that Rowena, at her age and condition of health, and at her great distance, should show activity in this suit, otherwise than she did show it, to wit, by allowing and having her sister Jane, who was near the place of the controversy over the land, and who was far more competent to attend to the matter for her than she was to look after it for herself.

The same remark is true in regard to what is so much commented upon, to wit, her alleged reference of "the man from Pennsylvania" (R., 62, fol. 100) and of Mr. Atwell, when talking to her about the land, to her attorney (R., 61, fol. 100), for information, or in regard to getting the land. It was evidently the part of wisdom, as well as of necessity under the conditions, that she should refer such inquirers to her sister, who did have, in common with Rowena, an interest in the other portion of the 120 acres of land, of which that in suit is part.

III. The next matter of fact referred to as showing fraud, and that the deed of the 11th of June was not honest, is "the want, or total inadequacy, of consideration for the transfer," as stated on page 18 of the opposing brief.

Now, the reply to that is obvious and conclusive. By the testimony of Rowena and of William, it is proved positively that there not only was no want of consideration, but that there was a full consideration, in this, to wit, that the land was originally entered by the two sisters, with money furnished from the paternal estate coming to the two, and that the holding by Rowena, from 1862 until the time of this suit, was a holding in common in equity, although the legal title was in Jane And since there were 120 acres so bought and held in common, Jane well might convey the 40 acres covered by the deed of the 11th of June, to Rowena, her cotenant and co-heir of her father. Indeed, any other conduct than such conveyance, if the title in Jane had come to be threatened through litigation, would have been dishonest. In other words, Jane, as the holder of the equitable title of Rowena, had no right to allow it to be sacrificed, on account of any of the affairs of Jane, which did not in equity affect the interest of Rowena. Rowena, therefore, was, on the 11th of June, 1884, the owner of all appreciation in value that had come to the 120 acres of land, patented in 1862, including this 40 acres, which had, in fact, come from the location of the capital.

IV. The next allegation of fact pointed to, at page 18, opposing brief, in support of the attack upon the deed of the 11th of June, 1884, is numbered four, and

is in these words: "The grantor's control of the property after the alleged transfer."

The only material act of control by Jane, after the transfer of June 11, which is pointed to and relied upon by plaintiff in error, is that control which is indicated by Exhibit 21 (R., 86) and Exhibit 22 (R., 87), the first being a Memorandum of Sale by Rowena, through her sister Jane, as her attorney in fact, to William H. B. Stout.

It must further, in this connection, be carefully observed and kept in mind that there was, at the date when this $31,000 were thus secured to Rowena, no motive for making a collusive arrangement by which Rowena was to get $31,000. The theory of plaintiff in error assumes that this large amount was given to Rowena, and given, too, at a time when there could have been no motive for such a gift. For, at the date of this agreement of March 12, no attack had been made upon the deed, and it was utterly unanticipated and unknown to the parties. The attack upon the *bona fides* of the deed was not made until November 9, 1887 (R., 16).

This memorandum of sale bears date the 12th of March, 1887, and the Power of Attorney by Rowena was executed at Zanesville, Ohio, on the 19th of March, 1887. The circumstance that the contract was made by Jane on the 12th of March when there was no Power of Attorney in existence until the 19th of March, is pointed to as showing Jane's power to make the sale without a Power of Attorney from her sister; and the further fact that the contract for the sale stipulates for the conveyance of any interest of Jane in the property,

as showing that the deed of the 11th of June had not cut off all interest of Jane in the property.

It will be seen (at page 37 of the Record) that Joseph R. Webster, one of the attorneys of record for defendant in error, was called by the plaintiff in error to testify as a witness. At said page 37 of the Record it will be seen that said Webster drew both of those papers, and drew them at the same time; that the negotiations for that sale had opened a week or ten days before said 12th of March (R., 37); that the way in which the contract came to have the date of the 12th of March was that it was signed on that day, but because the Power of Attorney had not been returned from Rowena, at Zanesville, Ohio, no money was paid or papers delivered until after the Power of Attorney had been returned, which was about the 25th of March (R., 38). In the evidence of Webster it also appears that the Power of Attorney from Rowena, dated the 19th of March, was received at Lincoln and delivered to Jane before the said agreement was delivered to Stout, and before Stout paid any money. These facts make it abundantly plain that the Power of Attorney of the 19th, the Memorandum of Agreement of the 12th, the delivery of the Power of Attorney, and the payment of the $500 were one transaction, conducted under the direction of Mr. Hall on the part of Rowena Young, and Mr. Webster on the part of Stout. It further appears by the testimony of Mr. Webster that the $500 went to Mr. Hall, the attorney for Rowena, and that he, Hall, applied it to the payment of the costs in the three suits of Rowena, she thus getting the benefit of this $500 (R., 36, fol. 58; and R., 58, fol. 94).

In regard to the provision in the memorandum (Ex-

hibit 21) requiring Jane's interest in the forty acres to be conveyed, which is pointed to by plaintiff in error as evidence that she retained an interest in the land after the deed of the 11th of June, the obvious reply is that the land was then in litigation; the land still stood in the name of Jane; the memorandum spoke of the land as then in litigation; the result of that litigation was stipulated about in the memorandum; hence it was evidently business prudence for Stout to require that Jane should unite in a deed for this land, especially as the Memorandum of Agreement provided expressly that it is to be made without covenants, and, therefore, so far as Jane was concerned was to be a release of what the memorandum in fact showed she had no interest in, because she was to get no part of the purchase money. Again, it will be observed (page 39 of the Record, fol. 63), that Mr. Webster attempted to explain why Jane Y. Irwin's name was inserted in the memorandum, and objection was made to his stating it by plaintiff in error; and, thereupon, the plaintiff in error rested the case. So that the opportunity to give the explanation by the man that was responsible for the introduction of Jane Irwin's name in this paper was cut off.

The result, therefore, of this history of said Exhibits 21 and 22, and of said payment of said $500, and of the said covenant in said Exhibit, by which Rowena is made the absolute owner of the $31,000 in the event the sale is consummated, instead of making for the contention that this deed of the 11th of June is collusive, really establishes, beyond reasonable controversy, the opposite. It so establishes the opposite, unless it can be imagined that Jane Irwin, seven months before

any question was made as to the *bona fides* of the deed, with her eyes open and acting under the advice of counsel, would make, in writing, covenants that would render it impossible for her ever to receive a dollar of the consideration money for this land, which, it is alleged, she owned all the while after the deed of the 11th of June, 1884.

V. The next fact pointed to, as showing the deed of the 11th of June to be fraudulent, is the relationship between Rowena and Jane.

Of course the fact of relationship is not controverted, but that fact, instead of making against the integrity of this deed, is strongly, almost overwhelmingly, in favor of the *bona fides* of the deed. It is so simply because of the conclusively established fact that the deed of the 11th of June grew out of and was made indispensable by the very fact of this relationship. They were children of the same father, from whom the home farm, still held in common, came, and from whom came the money that entered the 120 acres in 1862, and whereby Rowena had, along with her sister, an equal share in the whole 120 acres; and thus it came to pass that, if justice ever was to be done to Rowena by Jane regarding this 120 acres, the deed to Rowena must be made, and it was made.

VI. The next fact pointed to (on page 18 opposing brief), as indicating fraud in the conveyance of June 11, is numbered six, to wit, that "The petition was neither signed nor sworn to by the nominal plaintiff, and even the answer to the petition of the defendant below was filed without any verification whatever."

The reference there is to pages 1 and 22 of the record.

In regard to the non-oath of the plaintiff to the petition (R., 1) the obvious and easy reply is, that the plaintiff was in Ohio; the suit was in Nebraska, and the distance between the two was about 900 miles. The Code of Nebraska provides for the petition being sworn to in such a case as that by the attorney of the plaintiff; and it was sworn to by the attorney of the plaintiff, R. S. Hall.

The accusation herein made by the plaintiff in error is one that not only involves Jane Irwin and Rowena Young, but involves their attorneys, for if this suit in ejectment was not honest and the deed was collusive they must have known it and become parties to the fraud upon the jurisdiction of the Circuit Court.

So much for the petition in ejectment not being sworn to.

Then in regard to the absence of an oath to the answer (found on page 22 of the Record), filed by the defendant in error to the petition of the plaintiff in error, to oust the jurisdiction of the Circuit Court, it ought to be sufficient to say that if the absence of an oath to the said answer to the petition to dismiss for want of jurisdiction is a badge of fraud, then that badge equally attaches to said petition, which terminates on page 19 of the Record; and it will be there seen that, although the form of an affidavit filled up to be sworn to by J. C. De Putron is there, yet it is not sworn to or signed by him, or by any officer. Thus the badge of fraud is made materially stronger against the petition than against the answer.

The plain truth of the matter is, that this appeal to the fact that this pleading, not required to be sworn to,

was not sworn to by the party making the reply, who was nine hundred miles away, is utterly frivolous.

VII. The next fact pointed to in the opposing brief, as indicating the fraud of the deed of June 11, is, "The non-production of the correspondence by which the transfer was *affected*" [effected].

If this statement, numbered seven (page 9, opposing brief), about the non-production of correspondence, means correspondence that brought about the making of the deed of June 11, then a reply to this is, that the Record does not show that there was any such correspondence by letter. Indeed, Rowena (R., 65, fol. 106), in answer to the question, "During all this time have you ever personally written a letter to her?" ~~She answers~~ said, "No, sir; not myself, for I never write letters."

It does not appear by the testimony that her brother William P., or anybody else, wrote any letters on the subject of making this deed of June 11; and no witness was asked, in the examination, whether there were any such letters.

But, in further reply to this suggestion of fact, numbered seven (page 19, opposing brief), about the non-production of correspondence, it must be borne in mind that in the spring of 1884, and according to the recollection of William P., before the making of the deed, the making of this deed was talked over at the time of the meeting of the two sisters, Jane and Rowena, at Zanesville (R., 59, fol. 96). At Record, 59, fol. 96, the testimony of William P. is as follows:

"Q. Do you know anything about the deed made by Jane Y. Irwin June 11, 1884, to Rowena Young, for the 40 acres of land near Lincoln, Nebraska, in controversy in this suit? A. Do not know, except as heard between

Rowena and Jane, at Jane's visits in 1883 or '84, and 1887, and my sister Rowena's talk since. Q. Was this talk, at Jane's visit in 1883 or 1884, prior to the making of the deed? A. I think it was. That is my impression; am not certain."

Rowena herself was not asked about whether it was arranged, before the deed was made, that it should be made between her and her sister at this visit, or any other time, and was silent on that subject. But this testimony quoted from William P. (at page 59), is all there is on the subject, and it raises at least a presumption that it was arranged between the two sisters on the occasion of this visit that the deed should be made.

And we repeat the question, why should it not have been made, since it was amply due from Jane to Rowena that it should be made?

VIII. The next suggestion of fact (on page 19, opposing brief), numbered eight, and says: "The commencement of the suit, before the grantee could have received the deed and directed the beginning of litigation."

The suit in this case was commenced June 14, 1884 (R., 1.). The deed bears date June 11, 1884; so that only three days elapsed between the making of the deed and the commencement of the suit; and it is true that this lapse of time, between these two transactions, was not sufficient to enable a mail to go from the place of the execution of this deed to Zanesville, Ohio, and for an order to be returned by mail, to the attorneys in Nebraska, to commence such suit. But this consideration in the present case is, in our view, utterly imma-

terial, because it is not the position or view of the counsel for defendant in error that any such transaction through the mails brought about the institution of this suit.

The truth of the matter is, as already in substance stated, that Jane had been the trustee and agent, touching this land of her sister, ever since the period of the patent, in 1862. The title had rested in Jane until June 11, 1884, and the care of the interest of Rowena had remained wholly with Jane. They had arranged, as already indicated, in the spring of 1884, shortly before this deed was made, for the making of the deed. The land was notoriously in the possession of the adversaries of Rowena, at the date of this visit, and of the making of the said deed; and the expiration of the ten year limitation was not remote. Every consideration of prudence dictated the making of this deed to the real owner, and the prompt commencement of the suit; and the suit was, no doubt, agreed upon at the time the deed was agreed upon, and was brought in pursuance of that understanding between Rowena and her sister, and in pursuance of the mandatory dictates of ordinary business prudence.

2d. Again, the burden of showing this deed, and the suit, in the name of Rowena, to be fraudulent and collusive, is upon the parties so alleging it; and another circumstance against the establishment of such fraud is the presumed integrity of counsel engaged in bringing the suit.

We shall presently come to the question of the degree of proof required to establish a fact assailing this deed for fraud, and the institution of the suit as collusive (*infra*, p. 46).

IX. The next suggestion of fact (on page 19, opposing brief), is numbered nine, and is that "the grantor furnishing the means to conduct the litigation."

The reference, in support of this proposition nine, is to page 58 of the Record, where Jane Y. Irwin is credited as having paid to the clerk $166.66⅔ deposit on account of costs herein. The truth is, that this $166.66⅔ is the third of $500 of costs, that were deposited by John, the husband of Jane, in the three suits, pending in the same court at the same time, wherein Rowena was plaintiff in ejectment, for the recovery of distinct portions of the 40 acres, of which the lands in controversy are a part; and that Jane, and the parties who advanced the money for her to make these three deposits of $166.66⅔ each, were reimbursed by Rowena the moneys so advanced and deposited; this by the use of the $500 paid by Stout, as above explained, pursuant to the Memorandum of Agreement Exhibit 21 (R., 86).

It will be seen, by referring to page 20 of the Record, that there were three suits pending, touching this 40 acres of land, of Rowena Young as plaintiff against the several parties holding portions of the same 40 acres of land; and it will also be seen by this entry of costs (at page 58 of the Record) in Young vs. De Putron, that $166.66⅔ is one-third of $500; the same deposit having in fact been made in each of the three cases mentioned on page 20 of the Record, as security for the costs; or, rather, $500 being deposited in gross to the credit of the three, and the entry made of one-third in each case by the Clerk. And, at page six, the Court orders, for the purposes of trial, the consolidation of the three cases.

The fact that the $500, paid by Stout, in said Exhibit 21 (R., 86), was so applied, has been already alluded to above, as derived from the testimony of Charles L. Hall, &c. Thus it is made to appear that this allegation of fact numbered nine (on page 19, opposing brief), like all the rest, turns out to be unfounded.

X. The next proposition of fact (on page 19, opposing brief), is numbered ten, and states that: "The plaintiff had never seen the property in controversy."

This suggestion, under the conditions disclosed by the record, seems to us to be really frivolous, and to demand no attention. The explanation of why it was that Rowena had never seen the land is furnished by the fact that it was originally an entry of land from the United States, and probably more than one-half of all the land ever taken by private entry is land that was never seen at the date of the patent by the patentee, and besides that, in the present case this Rowena, as has already been seen by reference to the testimony, is an old woman, and at the date of the entry was old, was unused to travel, and there was no reason why she should have seen the land over which her sister Jane, a co-tenant with herself had supervision, and to which she, Jane, gave abundant care.

XI. The next and final proposition of fact in the opposing brief (page 19), is numbered eleven, and is as follows: "The attorney of record, Frank P. Ireland, witnessed and acknowledged the deed of Jane on June 11, 1884, and without showing any employment by Rowena he files the petition in this case on June 14, 1884."

Counsel for defendant in error are at a loss to con-

ceive what the point is in this eleventh accusation of fact.

The fact that Ireland was an attesting witness to the deed of June 11, and notary before whom it was acknowledged, and that he becomes an attorney of record, without showing any employment by Rowena, seems to be pointed to as indicating fraud and collusion. The suspicious circumstances which are in this eleventh paragraph designed to be pointed out, we imagine to be that one of the attorneys prosecuting the ejectment was the attorney for the grantor Jane Y. Irwin, in making out the deed to Rowena, and that he, Ireland, could have had no relations of employment with Rowena because of Rowena's distance from the place of making the deed.

If this eleventh paragraph is entitled to any notice here, it will be sufficient to say, in regard to it, what has, in substance been said in regard to some of the preceding ten paragraphs.

One of these suggestions is, that there is incompatibility between Ireland's taking the acknowledgment of the deed of June 11, and his becoming the attorney for Rowena in recovering the land granted by the deed.

Another objection, in this paragraph eleven, is one which has already been fully considered, to wit, that there was no time to consult through the mails with Rowena, between the date of making the deed of June 11, and the bringing of the suit. We refer to what we had said touching the eighth paragraph (*supra*, p. 41), as the reply to this suggestion, that Rowena could not, after the making of the deed, have employed counsel who brought her ejectment suit.

Another reply is, that it is not necessary, in order that counsel may appear as counsel of record in court, that the record disclose the fact that they were employed.

What we have gone over in noticing these eleven propositions of fact, covers the entire field of accusation brought by the plaintiff in error, in support of the attack upon the jurisdiction of this Court, based upon the charge of fraud and collusion, in the making of parties to the suit.

Any further allusion to the questions of fact which may be noticed in this brief will be made as we proceed to notice the various propositions of law, which are suggested in the brief of plaintiff in error; and we therefore turn now to a statement and view of some of the suggestions of law that are appropriate in the present discussion concerning the Jurisdiction of the Circuit Court.

(B) Propositions of law upon the question of jurisdiction; degree and burden of proof.

The first proposition of law, to which we direct the attention of the Court, is the one to which reference has already been made, to wit:

WHAT IS THE DEGREE OF PROOF required of the party who assails the jurisdiction of the Circuit Court, on the ground that a party has been fraudulently and collusively made a plaintiff, for the purpose of giving jurisdiction to the Federal Courts, as against the State Courts?

Under this head, our first suggestion is, that when the evidence of that collusion in making the parties is found in the alleged fraudulent character of a transfer

or assignment or grant or deed of conveyance, then in every such case the charge of fraud in the assignment or grant or deed must be made out by that degree of proof which is requisite to overthrow any other like deed of conveyance or assignment.

In the present case, the deed is absolute on its face, and leaves no manner or degree of interest in the grantor, Jane Y. Irwin; therefore, if it is not to be sustained according to its face, it must be totally overthrown, in order to make out the proposition that Jane Y. Irwin retains an interest of any sort in the land. The deed tolerates no such idea. Hence, the attack upon this deed must result in its complete overthrow, in order to result in anything beneficial to this attack upon the jurisdiction of the Circuit Court. There is not a scintilla of proof anywhere in the record tending to show that some fraction of interest was left in Jane whilst the residue passed to Rowena.

The position of plaintiff in error is that Rowena has no interest whatever by virtue of the deed. Hence, as already suggested, the degree of evidence required for the purpose of defeating the present jurisdiction through this attack upon this deed is the same that is required in a court of equity in order totally to destroy any other such conveyance of land.

Now, what that degree of proof is has repeatedly come under judgment in this Court, for example, in the case of Maxwell Land Grant, 121 U. S., 325, which was a case of great magnitude, and received the most elaborate consideration from the Court. This Court laid down the rule touching the degree of proof required to overthrow deeds and other solemnly executed

written instruments, as expressed in the syllabus, in the following words:

"The general doctrine on this subject is, that when, in a court of equity, it is proposed to set aside, annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

In the citation of the authorities by this Court on that proposition, it quotes from the language of Justice STRONG, as found in Atlantic Company vs. James, 94 U. S., 207, as follows:

"Canceling an executed contract is an exercise of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

This Court, in the Maxwell Land Grant case, then proceeds in the following words (bottom page 380 and 381):

"In Story's Equity Jurisprudence, Section, 157, it is said that relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. Chancellor KENT, in the case of Lymann vs. United Ins. Co., 2 Johns. Ch., 632, which had reference to the reforming of a policy of insurance, says: 'The cases which treat of this head of equity jurisdiction require the mistake to be made out in the most clear and decisive manner, and to the entire satisfaction of the Court.' (See also Stockbridge Iron Co. vs. Hudson Iron Co., 107 Mass., 290). We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in

the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

The same thing is repeated in Colorado Coal Co. vs. United States, 123 U. S., 316–317.

The same doctrine is strongly stated in similar language by this Court in the following cases: In respect to jurisdiction, this Court, in the case of Barry vs. Edmunds, 116 U. S., 550, applies substantially the same rule as to the weight of evidence required, in order to overthrow the jurisdiction of the Federal Courts, where the jurisdiction depended upon a question of fact, set up to defeat the jurisdiction. The proposition, on this point, decided in that case, is correctly stated in the syllabus in the following words:

"A suit cannot properly be dismissed by a Circuit
" Court of the United States as one not substantially
" involving a controversy within the jurisdiction of the
" Circuit Court, unless the facts, when made to appear
" upon the record, create a *legal certainty* of that con-
" clusion."

In the body of the opinion, in that case, commenting on the words in Section 5 of the Act of March 3, 1875 (18 Stats., 472) that

"If * * * it shall appear to the satisfaction of
" said Circuit Court, at any time after such suit has
" been brought or removed thereto, that such suit does
" not really and substantially involve a dispute or con-
" troversy within the jurisdiction of the said Court,"

the Court uses the following language regarding the power of this Court to reverse, on writ of error, the Circuit Court's conclusion that it (the Circuit

Court) had not jurisdiction, because the amount involved was not sufficient to give the jurisdiction (p. 559):

"But upon such partial conviction, however strong, the Circuit Court would not be at liberty to act, unless the facts, on which the persuasion is based, when made distinctly to appear on the record, create a *legal certainty* of the conclusion based on them. Nothing less than this is meant by the statute, when it provides that the failure of jurisdiction, on this account, shall appear to the satisfaction of the Court."

In that case the question of fact was the amount involved. In the case now at bar, the question is the fraudulent and collusive character of the deed of Jane. It can certainly make no difference what the question of fact is, that is relied on to defeat the jurisdiction. In each case alike the fact must be established, to use the words of this Court, in Barry vs. Edmunds, *supra*, to a "*legal certainty*."

We, therefore, conclude this particular point by submitting that if there were no other fact in the case than that disclosed by Exhibit 21 (R, 86) which shows that under the advice of the able counsel, and seven months before the parties to that agreement (Exhibit 21), could have known that the question of the *bona fides* of this deed would ever be drawn in question in any litigation, the plaintiff below, Rowena, acting through her sister Jane, deliberately entered into a written covenant, by which, in the event of the success of this suit for the recovery of this land, every dollar of the consideration thereof was secured absolutely and without contingency to Rowena, as against Jane and all the world, is conclusive of the *bona fides* of the deed, and that no interest was retained therein by Jane, hence,

Rowena is not collusively made plaintiff in this cause; and the decision of the Circuit Court to that effect was undoubtedly right and must be affirmed even if this Court can re-try the issue *de novo*.

THE AUTHORITIES.

(C) It is only where it appears to "a legal certainty," by the character of the transfer, assignment or conveyance, taken in connection with the circumstances entering into the transfer, assignment or conveyance, and which is the subject of attack, in order to defeat the jurisdiction of the Circuit Court, that there is retained in the assignor, or grantor, an interest in the subject matter of the litigation, that the Courts hold the assignment to be fraudulent or collusive within the meaning of Section 5 of the Act of March 3, 1875.

Prior to the Act of March 3, 1875, it has uniformly been held that if the transfer conveyed to the grantee all the title and interest of the grantor in the thing granted it was a matter of no consequence that the grantee could sue in the courts of the United States when the grantor could not (114 U. S., 143). And it made no difference that the transfer of the subject of controversy was for the purpose of obtaining such jurisdiction.

McDonald vs. Smalley, 1 Pet., 620.
Barney vs. Baltimore, 6 Wall., 288.
Smith vs. Kernochen, 7 How., 216.

This rule has not been overturned or affected by any

decision of this Court since or under the Act of March 3, 1875. Every decision of this Court, under that act, involving a dismissal for want of jurisdiction, arising upon a transfer of the subject of controversy just prior to suit, has been based on the *grantor's retention of some interest in the thing granted*, so that the nominal plaintiff was either without any interest other than a naked trust, or was jointly interested with the grantor, making the controversy one in which the grantor had yet a real and substantial interest. Every citation on pages 16, 18 and 19 of the opposing brief in which a dismissal was ordered proceeds on this ground for the order.

The rule above stated has repeatedly been applied in the various Circuit Courts in cases determined since the Act of 1875. In Williams vs. De La Veaga, 5 Sawyer, 573, 1879, the rule is stated, by Justice FIELD, thus:

"There is no doubt that the sole object of the deed to Cones was to give this Court jurisdiction and that the grantor has borne and still bears the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he choose to do so, and the Court will not at the suggestion of a stranger to the title inquire into the motives that induced the grantor to part with his interest. It is sufficient that the instrument is valid in law and that the grantee is of the class entitled under the laws of Congress to proceed in the Federal Court for the protection of his rights. It is only when the conveyance is executed to give the Court jurisdiction and is accompanied with an agreement to re-transfer the property at request of the grantor upon the termination of the litigation that the proceedings will be treated as a fraud upon the Court."

This case is cited by the plaintiff in error and correctly states the rule.

Again, in Collinson vs. Jackson, 8 Sawyer, 357, 1882, this rule is stated by DEADY, J., at page 363, thus:

"Nor is it material, if true, that the assignment to the plaintiff was made for the purpose, or with the view to enabling him to sue on the note in this Court. If the assignment was actually made, and the interest of the assignor absolutely vested in the assignee, without any agreement or understanding to return, or account, to the assignor for the proceeds, the *motive*, or *purpose* of the latter in making the assignment does not affect the right of the assignee to sue in this Court. This is well established upon reason and authority."

In Hoyt vs. Wright, 4 Fed. Rep., 169, 1880, HALLETT, Judge, says:

"A party having property may sell it for the express *purpose* of enabling his vendee to sue in this Court, and if it be a *real* sale and not a sham, that is no objection to the jurisdiction; but, if the transfer is *colorable merely*, if, notwithstanding the transfer, he still retains his interest in the property, and is still the owner of it, then it would be a collusive proceeding, which, of course, would not confer jurisdiction. The question in such a transaction as this is whether there was a *real transfer of* the interest by which the vendee in the conveyance *obtained a title*, or whether it was colorable merely."

In Neale vs. Foster, 36 Fed. Rep., 41, DEADY, J., says:

"The *motive* with which a party purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout in this Court, any more than in a State Court. The *only* question to be considered is, did the judgment creditors *sell and assign* the judgments in question *absolutely*, without any trust or reservation in their own favor? In other words, was the sale a *real and not a fictitious one?* As I have said, the evidence is satisfactory on this point, the sale was

absolute and unqualified. This being so, it is altogether immaterial that the judgment creditors may have been induced to make the sale they did, because they feared they would not succeed in enforcing the judgments in the State Court, the tribunal of the defendants, or that the plaintiff made the purchase because, being a citizen of Illinois, he thought he could enforce the same against the property of the judgment debtor in the hands of the Crawfords, by a suit in this Court, the interstate tribunal, and that he intended to do so when he brought them."

See also:

Marion vs. Ellis, 10 Fed. Rep., 411 and 412.
Warner vs. Penn R. R. Co., 13 Blatchf., 232.

In the case at bar there is no evidence showing, or in any substantial degree tending to show that plaintiff was not the sole party interested. The deed was absolute. By her own evidence and that of her brother, it appears that she was, as we have seen, interested at time of the original entry in the whole 120 acres of which the lands in controversy form a part. *The land warrant used in the entry of this very land was purchased with the joint funds of plaintiff and her sister.*

III.

The next matter in the opposing brief (p. 21 et seq.), to which we care to allude, is where it is urged that a finding in the special verdict, as to the citizenship of the parties, was necessary to enable the Court to render judgment.

It seems to us that the answer to this objection is

conclusive and obvious. The cases cited in the Opposing Brief from 119 U. S., 342; 121 U. S., 253; 120 U. S., 223; 129 U. S., 618, and the other cases there cited in this connection are generally cases where the citizenship required to give the Federal Court jurisdiction, was not admitted by the pleadings, and where the courts held averment and proof of such diverse citizenship essential to jurisdiction. Every one of the cases cited to the other point, namely, that,

> "Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the Court will not render a judgment upon such imperfect verdict, but will remand the case to the Court below, with directions to award a *venire de novo*" (Prentiss vs. Zane, 8 How., 484)—

are here wholly inapplicable, because of the fact that the citizenship of the plaintiff and defendant in different States WAS ADMITTED BY THE PLEADINGS IN THE CASE AT BAR, and was not a question of fact which could be passed upon by the jury. Had the jury undertaken to find in contravention of this admission of the pleadings, the findings would have been void, as outside of the questions submitted to the jury or arising upon the record or trial.

That this question of diverse citizenship was admitted by the pleadings, and could not be passed upon by the jury, is established by the following considerations:

1. Section 914 of the Revised Statutes of the United States requires, that—

> "The practice, pleadings and forms and modes of procedure in civil causes, other than equity and admiralty

cases, in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, forms and modes of proceding existing at the time in the like cases in the courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

2. Section 134 of the Civil Code of Nebraska (Compiled Statutes of 1883), provides that——

"Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party as upon a direct denial or avoidance. Allegations of value or amount of damage, shall not be considered as true by failure to controvert them (Amended Sept. 1, 1873)"

3. Section 105 of the Civil Code defines what is a "material allegation," in these words:

"A material allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient."

4. By Section 282, page 567 of the said Code, it is provided in these words:

"The general mode of summoning, empaneling, challenging and swearing the jury is not changed by this Code."

It will be seen by the record (p. 8, fol. 12) that the oath the jury took was in these words:

"We, the jury, having been duly empaneled to well and truly try the issues joined, and a true verdict to render in the above-entitled cause," &c.

Which is the universally recognized and usual form of verdict, and allows the jury to try no other question than the "issues joined."

5. By reference to the petition in this case it will be seen that it distinctly makes that averment as to the citizenship of the plaintiff and defendant, which is essential to jurisdiction, in the following words (R., 1I.) :

"That the said plaintiff is a citizen and resident of the State of Ohio, and that the said defendant is a citizen and resident of the State of Nebraska, and that the matter or amount in dispute exceeds the sum of $500, exclusive of costs."

6. This is a material, indeed an essential, averment of the petition, within the sense of the word "material" as defined in the above quoted Section 105, without which the action could neither proceed nor the Court take jurisdiction, and is traversable.

7. In the answer to the said petition (Record, pp. 2 to 4 inclusive), it will be seen that there is no general denial of the averments of the petition nor any averment in the answer equivalent to that ; that the first defense set up is, in brief, one relying on an affirmative claim of title arising under a tax deed dated June 12, 1871 (R., 2 and 3) ; the second defense is the ten years bar of the Statute of Limitations (R., 4) ; the third defense is in these words :

"And this defendant, further answering, denies that the said plaintiff is the owner of the premises described in her petition ; and this defendant also denies that the plaintiff is entitled to the possession of the said premises, and prays," etc.

This is the entire answer, and it admits, therefore the averment of diverse citizenship in the plaintiff and defendant, as set up in the petition.

Even if there had been a general traverse, such traverse would not, under the decisions of this Court, have put in issue the matter of diverse citizenship essential to the jurisdiction of the Circuit Court. This is decided in Phil. W. & B. R. R. Co. vs. Quigley, 21 How., 214.

This Court there held, not only that the general issue, did not put in issue the matter of diverse citizenship, required to give the United States Court jurisdiction, but further held that the absence of a special denial of diverse citizenship operated as an admission of that fact. The words of the Court on this precise point are as follows:

"The only plea filed in this case is a general denial That plea raises an issue upon the merits of the complaint, and leaves the jurisdictional allegation without a traverse. No question involving the capacity of the parties in the case to litigate in the Circuit Court can be raised before a jury under such pleadings (Conrad vs. Atlantic Ins. Co., 1 Peters, 386; Evans vs. Gee, 11 Peters, 80; Owings, vs. Wyckliff, 17 How., 47)."

A reference to the case of Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S., 485, 501, A. D. 1882, will show that this Court, in the opinion of Justice MATTHEWS. recognizes the proposition we now state, to wit:

That if the state of the pleadings is such as not to put in issue, or otherwise question, the matter of diverse citizenship, then it is admitted, and is not necessary to be found in the special verdict of the jury.

In that case the Court cites the authorities to the point that "although, in the opinion of the Court, "there was sufficient evidence in the special verdict "from which the jury might have found the fact, yet "they have not done it, and the Court cannot, upon a "special verdict, intend it." The Court then states

in that case, that in order to establish the libellant's right to recover, it was essential to show "that the "risks insured against by the policy sued on were the "same which the libellant was adjudged liable for on "his policy to Melcher." The Court then proceeds in these words:

"It became necessary, therefore, to aver the title of the two insurances. This the libel does. But, as it was denied in the answer, it became necessary to prove it. The finding of fact, however, does not assert it. It contains other facts bearing on the question. But the conclusion itself is stated not as a fact, but as a conclusion of law from the facts," &c.

This, in this carefully worded opinion, where the Court says: "But as it is denied in the answer it became necessary to prove it," is equivalent to saying, that if it had not been denied in the answer, it would not have been necessary to prove it. That is to say, if the fact of identity of the two risks had been admitted by the state of the pleadings it would not have been necessary for a special verdict to have found touching this fact so admitted by the pleadings.

These suggestions now made, touching this point, seem to counsel for defendant in error to be conclusive, and to render further remarks about it unnecessary.

What we have now gone over, perhaps in unnecessary detail, embraces all we care to say upon the question of the jurisdiction of the Circuit Court.

We, therefore, turn to the questions of law arising on the special verdict.

THE MERITS UPON THE SPECIAL VERDICT.

The Plaintiff's Title.

The plaintiff rested on a connected title derived under patent from the United States. Upon this the jury found (see First Finding, Record, 8):

"That Jane Y. Irwin obtained title to said lands by patent from the United States December 15th, 1862, and on the 9th day of August, 1867, conveyed the same to William P. Young, who on the 5th day of February, 1874, reconveyed the same to Jane Y. Irwin, who on the 11th day of June, 1884, conveyed said lands to the plaintiff Rowena Young."

This establishes a complete and perfect title in the plaintiff.

It is admitted that the plaintiff must make out a legal title to recover in ejectment. But after she has made out as she did a complete and perfect title she may rest safely until her adversaries show in what manner that title is divested.

After the plaintiff had thus established her title, the defendant, to prevent her recovery, was under the same burden of proof that rested on the plaintiff until her title had been shown.

By the first finding of the jury the plaintiff's title is made out. This is clear and not disputed or disputable. On that, unless the defendant can by the other findings show that the title is divested, the plaintiff is entitled to recover.

To this title defendant below set up special and affirmative defenses claiming title in himself. Says MARSHALL, C. J., in Williams *et al.* vs. Peyton's Lessee, 4 Wheaton, 79, ~~before cited~~: "It is a general principle that the party who sets up a title must furnish the evidence necessary to support it." And it is here in-

sisted that, unless the remaining findings of the jury establish the claim of title made by the defendant, the plaintiff is entitled to an affirmance of the judgment.

The Affirmative Defenses.

In addition to the denial of plaintiff's title and right to possession, the defendant makes three affirmative defenses. Whether or not either of these is made out must determine the question whether the plaintiff is entitled to recover. The verdict being acceptable to both parties makes it, since the motions for judgment, equivalent to an agreed case.

Against this record title, perfect on its face, from the United States to the plaintiff, defendant relied on three claims of title, or defenses, viz.: an execution sale; a conveyance by one William T. Donovan, assuming to act as attorney in fact for Jane Y. Irwin; two tax deeds with a claim of ten years adverse possession thereunder; all of which claims of title, by sundry conveyances, unite in defendant.

I.

The Execution Sale.*

The 26th finding (R., 11) is in substance:

That one Sessions, May 19, 1877, recovered in the District Court of Lancaster County, Nebraska, a judg-

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* The apparent confidence with which the counsel for the plaintiff in error has urged the Curson sale as effectual to defeat the de-

ment of $350 and costs against Jane Y. Irwin (who then held legal title to said lands); that execution was issued thereon to the Sheriff, and levy thereof made on the 40 acres of which the premises in controversy are a part; and sale of the premises made to E. J. Curson for $30, by the Sheriff, who made return to the Court, and the first and second orders of confirmation of the sale were made October 2d and 10th, respectively, and deed made by the Sheriff conveying said 40 acres to Curson, October 10th, 1877, which was recorded the same day.

The 8th finding (R., 9) is that the land was then worth $20,000.

Ninth finding (R., 9) of the verdict is as follows:

"That the confirmation of sale was set aside by the District Court of Lancaster County, in which it had been made, November 3d, 1877, before E. J. Curson had made any conveyance to any one, and was never afterwards confirmed."

The 27th finding of the verdict (R., 12) finds a conveyance of the same land, by Curson to S. W. Little, November 9th, 1877, for $30, which was recorded on

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fendant's established title, has led us to present this matter at considerable length. Perhaps we ought simply to have quoted the opinion of the Circuit Judge, as expressing in a terse and clear manner the law on this subject in the State of Nebraska. He says:

"It is the settled law of Nebraska that the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; also, that one purchasing at an execution sale submits himself to the jurisdiction of the Court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders, or to rescind decrees.

"Phillips vs. Dawley, 1st Neb., 320.
"Bank vs. Green, 10 Neb., 134.
"Volland vs. Wilcox, 17 Neb., 50.
"Gregory vs. Tingley, 8 Neb., 322.

"It follows from these facts and decisions that the sale, temporarily confirmed, was finally set aside, and that no rights of a third party accrued during the time that the sale was apparently confirmed.

"Hence, this chain of title presented by defendants must fail."

November 26th. And a further finding (No. 40, R., 14) is that on September 26th, 1886, S. W. Little conveyed to DePutron.

Much stress is laid by the defendant on the claim of title thus derived. It is strenuously contended that legal title passed by the Sheriff's deed, and that, notwithstanding the subsequent order annulling the confirmation, it is good in a legal proceeding, and impeachable only in an action in Chancery to obtain its cancellation.

This claim of title being derived under the law and practice of the State of Nebraska, must stand or fall under the statutes and decisions of the State.

Under the law and decisions of Nebraska must be determined the effect to be given to proceedings of its Courts. The citation of authority from Courts acting under a different law and practice cannot avail to uphold a claim of title founded on proceedings taken in the Courts of that State, which are, under the law and practice of that State, insufficient to vest a title. This leads to an examination into the law and practice in the State of Nebraska, in respect to Sheriff's sales, and the requisites to establish a title to lands by virtue of Sheriff's sales, in that State, under the process of its Courts.

1. By the procedure in Nebraska, execution sales are assimulated to judicial sales proper. There can be no title except by the confirmation of the sale by the Court. The confirmation is the foundation and essence of the title. In Parut vs. Neligh, 7 Neb., 485, the Court say:

"The distinction between sales upon execution and those denominated judicial sales is to a great extent abrogated. Though it is still the fact that the officer

under the execution acts ministerially, and not as the organ of the Court. While in Chancery sales the Court is the vendor and the officer merely its agent."

In both cases the Court must review the Sheriff's proceedings. In case of execution sale it must confirm, if everything is regularly done (Balche vs. Webb, 11 Neb., 427), while in Chancery sales it has a discretion to confirm or to annul. No other clear distinction than above indicated remains between the proceedings under execution and proceedings for enforcement of decrees in Chancery, and the final order in both cases, like other final orders, is subject to review.

In Chancery the master's sale, even after the delivery of deed, may be vacated (Barker vs. Richards, 41 N. J. Eq., 660). So in Ohio, under a practice similar to that of Nebraska, the order of confirmation of a Sheriff's sale, if irregularly or erroneously made, may on motion be vacated and corrected at a subsequent term.

Elliot vs. Platter, 43 O. St., 206.

In Nebraska, in Fletcher vs. Ingraham, 4 Neb., 533, an execution sale was, upon petition, annulled long after payment and confirmation and deed. How long after does not clearly appear by the case. Sale was made May, 1868, and the opinion was handed down near the close of the January Term, 1876, there being but five cases thereafter decided at that Term, or prior to July, 1876, full eight years after the sale. The ground of relief in that case being mistake as to the identity of the land, discovered too late for relief by motion, remedy by petition was successfully invoked by the purchaser and the sale, confirmation and deed all set aside, and money restored to the purchaser.

2d. Had the order of confirmation been annulled upon appeal, it will not be contended that title could be claimed under it. Reversal of the confirmation annuls not only the order, but also the Sheriff's deed which is founded upon it. This is now established by adjudication to be the effect of reversal of the order of confirmation. Validity of the title under execution sale depends on the order of confirmation becoming a final one.

> " Under our law governing sales of property on " execution the title of the purchaser depends entirely " upon the sale being finally confirmed, and until this " is done the rights of the execution debtor are not " certainly divested,"

say the Supreme Court of Nebraska in *State Bk. vs. Green*, 10 Nebr., 134, a case where the question of the validity of title claimed under deed of the Sheriff became the matter to be determined. The validity of the Sheriff's deed depends on the continued force and vitality of the order of confirmation.

3d. The Court may review and annul its own orders. By the law and practice of Nebraska there is in all Courts of general jurisdiction power to vacate, annul, modify and review their own orders and judgments at the Term at which they were rendered. On this subject the Supreme Court of that State say, " The power " of the District Court to review and vacate its own " orders at the Term is purely discretionary " (Smith vs. Pinney, 2 Nebr., 145; see also Wise vs. Frey, 9 Nebr., 220; Hansen vs. Berquest, 9 Neb., 277; Volland vs. Wilcox, 17 Nebr., 50).

4th. Even after the Term the District Court by statute has power to vacate or modify its own orders, under Section 602 of the Civil Code, which, among other things, provides as follows:

"A District Court shall have power to vacate or "modify its own orders after the Term at which such "judgment or order was made. * * * Third, for "mistake, neglect, or omission of the clerk, or irregu- "larity in obtaining the judgment or order. Fourth, "for fraud practiced by the successful party in obtain- "ing the judgment or order. * * * Sixth, for un- "avoidable casualty or misfortune preventing the "party from prosecuting or defending." The limitations on subdivision 4 is two years, and on 3 and 6 three years.

The jurisdiction of the Court, by statute and decisions, being unquestionable, the vacating of the order operates on all parties to it and on all proceedings dependent upon it, to set the matter again at large.

The order of confirmation could not become certainly final till time for the correction of irregularity had passed, or at least not till the relations of the parties to it had changed before a review of the order was mooted. The order was vacated before there there was any change in the relation of the parties. There is a similar practice in Ohio: Elliot vs. Plattor, 43 O. St., 206.

It follows that title obtained at execution sale, under the law and practice in Nebraska, depends on the final confirmation by the Court, and while held by any of the parties to the sale, or to the judgment, is subject to all orders of review which the Court may properly make, or which the appellate Court may make, in regard to the proceedings of sale.

5th. It is objected that Section 508 of the Civil Code saves the title. The section reads as follows:

"If any judgments in *satisfaction of which* any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers, but in such case restitution shall be made by the judgment creditor of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale."

But for the saving act, the title in any case would fall with the reversal of the judgment on which the sale was made. But this case is not within the saving act, as the land was not sold "in satisfaction" of the order of confirmation; and it was not the judgment, but the order of confirmation, that was reversed. The sale might be regular and the judgment erroneous. In such case the purchaser, not a party to the judgment, is protected in the title. The purchaser is not affected by irregularity in the judgment, in which he had no part.

A second answer is that the purchaser is party to the order of confirmation. As to the sale and orders of the Court thereon he submits himself to the jurisdiction of the Court. As party to the sale he is affected with whatever of vice or irregularity there is in it. As party to the sale he is not within the provisions of the saving act, which saves only the title of one not a party to the order vacated or reversed.

The purchaser may appear and defend the sale. He would have no right to defend or to attack the judgment. To the judgment the sale is merely ancillary, not a part of the controversy. To the ancillary proceeding he becomes party by becoming purchaser. By the practice in Nebraska the purchaser can move

for the order of confirmation, or to set aside the sale, or can appeal from it for review of the order, and he may be compelled by summary proceedings to perform his bid, and is concluded by the result of the proceedings to confirm or to annul the sale.

Phillips vs. Dawley, 1 Neb., 321.
Gregory vs. Tingley, 18 Neb., 322.
Paulett vs. Peabody, 3 Neb., 197.

The orders made on the judicial review of the sale have all the conclusiveness of a judgment *inter partes*, as to the purchaser as well as the parties to the suit. It is, as to the matter, a judgment to which the purchaser is a party.

6th. Curson regarded himself as affected by the order and in fact did, as pointed out by the Circuit Court in its opinion (R., p. 23), take proceedings to review the orders annulling the confirmation and the sale (M. H. Sessions & Elijah J. Curson vs. Irwin, 8 Nebraska, 5); and the order in that case was in fact the final order by the Supreme Court of Nebraska, upon Curson's appellate proceeding taken from the order setting aside the confirmation and the subsequent order setting aside this sale.

It may be objected that this is *dehors* this record and that this fact is not found by the jury.

It is enough that Curson could do so whether he did or not. This being established, all presumptions which in the Courts are recognized to support the regularity of proceedings of courts of general jurisdiction, until the want of jurisdiction is, by the assailing party, made to appear, support the regularity of the order, vacating the confirmation. The presumption must be that

Curson had notice; that the motion was made in time; that the order vacating the confirmation was regular.

Reynolds vs. Stansbury, 20 Ohio, 354.
Gilbert vs. Brown, 9 Nebr., 94.
Hansen vs. Berquest, 9 Nebr., 276.
Vindquest vs. Perky, 16 Nebr., 286.
Dodge vs. People, 4 Nebr., 228.

The case at bar is strictly analogous to State Bank vs. Green, 10 Nebr., 134, before cited, as the vacation of the order of confirmation, in the Court wherein rendered in the proper review and correction of its own order is strictly equivalent to reversal by the Supreme Court in appellate proceedings.

Under this rule Curson purchased. The Court annulled the confirmatory order and the jury find that the sale "was never afterwards confirmed" (R., p. 9, finding 9). At the time the order was annulled the rights of no third party had intervened. Curson did not attempt to convey until November 9th (9th finding, R., 9, and 27th finding, R., 12) and before he attempted to do so the Court, on November 3d (R., 9), vacated the order of confirmation on which the apparent title depended. This order Curson might have taken to the Supreme Court for review; in fact he so did. The orders vacating the confirmation, and also the subsequent one annulling the sale, were both affirmed, 8 Nebr., 5, before cited. It is clearly *res judicata*. But, inasmuch as the lower Court of the State had jurisdiction to vacate the order, it is clearly *res judicata*, whether Curson took the matter up to the Supreme Court of the State for review or not. As a consequence, no title can be founded on this sale or defense.

Review of brief for plaintiff in error as to the Sheriff's sale.

7th. Having thus far discussed the law and effect of Sheriff's sales in Nebraska, it remains briefly to notice the points of contention by plaintiff in error regarding this claim of title. At page 25 of the opposing brief it is insisted that the Court did not intend to affect the title apparently acquired by Curson as the order of the Court is silent in respect thereto, and no order is made in respect to the $30 purchase money. To this it is a sufficient answer that the intent of the Court must be deduced from the necessary legal effect of the order itself. The effect of that order has already been shown. 2d. It does not appear that Curson ever paid to the Sheriff or into Court any sum whatever, neither in the 26th finding (R., 12), to which reference is made, nor yet by any finding whatever, so that if he paid nothing no order for his protection was necessary. 3d. On the annulling of the sale, had the money been paid, the judgment debtor Irwin would not owe Curson, but the judgment creditor Sessions might be the debtor of Curson in case he had received the money or had credit for it in the payment of costs of sale. Curson would also have an equity of subrogation or right to be compensated out of moneys collected upon the judgment, but he would have no lien on the land as for purchase money. 4th. The suggestion that the Court intended the order only to leave it open to Irwin, the then holder of the legal title, the judgment debtor, to claim compensation from Sessions is without merit, for the Court must have intended the order to have its necessary legal effect. The 8th finding (R., 9),

shows affirmatively that the forty acres sold at the nominal sum of $30 was then worth the sum of $20,000 and the attempt of Curson, or Little, to whom it is soon after attempted to be conveyed, to obtain title to it at this less than nominal consideration does not indicate that either Curson or Little were to any great degree *bona fide* purchasers, as apparently claimed in the opposing brief.

At pages 26 and 27 of the opposing brief it is contended that Curson was not a party and could not be affected by the order. Counsel here fall into an error in that they fail to distinguish between the effect of the reversal of the judgment on which a valid sale may prior to the reversal have been made, and the setting aside in due course of the confirmation or the sale. The section of the statute preserving the validity of sale in case of the subsequent reversal of judgment, we have above quoted and discussed, and have shown that the purchaser is a party to the ancillary proceedings of sale, though not party to the judgment. The citation of authority in the opposing brief at page 27 are all to cases in which the judgment, not the proceedings of sale, were reversed or annulled, and therefore are not applicable to the case at the bar.

The discussion of counsel in the opposing brief at pages 28 to 33 inclusive would be apposite enough in an argument addressed to the Supreme Court of Nebraska in a case seeking to obtain a review or overruling of its former decisions on this subject, though many of the citations to decisions founded upon a different system of procedure in which the Sheriff's sale does not depend upon a confirmatory order by the Court would even then be inapplicable. Before this

Court, in which the inquiry is limited to ascertaining what is the legal effect of the facts found by the Jury under the law and practice of the State in which they were had and done, on a matter in which the practice of that State is now settled and its decisions consistent, uniform and coherent, the citation to decisions of other States under a different practice are peculiarly inapt. It is respectfully submitted that this Court will not overrule the decisions and settled practice of the State Court. If there is any subject upon which the State decisions are conclusive it is upon the effect of Sheriff's sales under process issuing out of the State Courts. It is also to be observed that the practice and the decisions of the Nebraska Courts are in entire accord with those of Ohio from which the State of Nebraska adopted its civil code and the whole form of its civil procedure.

II.

The deed under the Donovan Power of attorney was void and conveyed no title.

The second affirmative defense made by the plaintiff in error below is a claim of title based on a conveyance by Wiliam T. Donovan, assuming to act as attorney in fact for Mrs. Jane Y. Irwin, who then held the legal title to the premises. The conveyance by Donovan was made to one Lantz, who immediately conveyed to S. W. Little the grantor of the defendant, plaintiff in error.

The findings of the jury on this claim of title (all of which we here collate), are as follows:

2d. Finding (R., 8). On the 31st of March, 1874, Jane Y. Irwin and husband entered into contract with N. S. Scott, Samuel Boyd and Milton Lamaster for the selling and subdivision of said lands.

3d. (R., 8) And said Scott, Boyd and Lamaster soon after entered upon said lands under said contract and staked out the block corners and street intersections, being engaged in the survey on the lands in controversy and other lands for a period of about two months, finishing their survey about the last of May, 1874.

4th. (R. 8)) On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donovan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and Lamaster, and to facilitate their operations under their contract of March 31st, 1874 (repeated *verbatim* in finding 28).

29. (R., 12) That on the 25th day of October, 1879, the said Jane Y. Irwin and John Irwin, by William T. Donovan, their attorney in fact, for the purported consideration as expressed upon the face of said deed, of $1,000, made, executed and delivered to one John P. Lantz their warranty deed, conveying the northeast quarter of the southwest quarter of Sec. 24, Tp. 10, Range 6 east (and other described land part of the 120 acres, not included in this controversy), which deed was recorded in the County Clerk's Office of Lancaster County, Nebraska, the 25th day of October, 1879, at 4 o'clock and 25 minutes P. M.

30th. (R., 13) That on the 25th day of October, 1879, said John P. Lantz and Hannah Lantz, his wife, by their deed of general warranty, and for the consideration of $1,000, as expressed in said deed, paid by Samuel W. Little to John P. Lantz conveyed, the property in the last finding above described to said Samual Little, which deed was on the 25th day of October, 1879, at 4 o'clock and 30 minutes P. M., recorded in the County Clerk's Office of Lancaster County, Nebraska.

14th. (R., 9) That the said deed by Donovan to Lantz, and the deed of same date by Lantz to Little were executed at the same time and were parts of one transaction, and that the northeast quarter of the southwest quarter

of Sec. 24, Tp. 10, R. 6 east, was on the 25th day of October, 1879, worth $30,000, and that the balance of the land then by Donovan conveyed would exceed $70,000 in value at that time.

13th. (R., 9) The jury find that the conveyance from Jane Y. Irwin and John Irwin by William T. Donovan, attorney in fact, to J. P. Lantz, was a fraud upon the power held by said Donovan, and was given by Donovan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such fact and procured such conveyance to be made with such knowledge and design.

37th. (R. 14) That September 25, 1883, Little and wife by deed of general warranty for the consideration of $10,500 sold and conveyed to defendant, DePutron, the land in controversy, which deed was recorded September 6th, 1883.

40th. (R., 14) We find that John C. DePutron, defendant, is a brother-in-law of S. W. Little, his grantor, and that there is no proof of any consideration paid by DePutron to Little for such conveyance.

16th. (R., 9) We find that all the defendants had full knowledge of the revocation of the power of attorney aforesaid, upon the record by Jane Y. Irwin, and of the facts therein stated prior to any purchase made by them or either of them.

In brief, we have the accepted facts that plaintiff in error, with full notice, and without any apparent consideration, received conveyance of this claim of title from a near kinsman who concocted and devised the fraud, and who obtained colorable conveyance through Lantz from Donovan professing to act as an attorney in fact, of property then of the value of over $100,000 for the "*purported*" consideration of $1,000, or one per cent. of its value.

On the established facts there will be no stretch of presumption or latitude of construction to uphold the transaction and effectuate the fraud. Donovan, invested with trust and power to make conveyances to

purchasers from Scott, Boyd and LaMaster, covinously violated the power and attempted to convey to Lantz, who was not a purchaser, and who paid no consideration, and through Lantz to Little, who devised the fraud and who is DePutron's near kinsman and grantor.

The plaintiff in error, contends that they have carried the shameless fraud too far to be redressed in a court of law. We contend, on the other hand, that the deed of Donovan was beyond his power, and was never effectual to convey the legal title. We deny, on the foregoing findings of fact, that the legal title passed by virtue of the conveyance of October 25th, 1879 (29th Finding, R., 12), executed by Donovan to Lantz, and by the simultaneous conveyance from Lantz to Little (Findings 30th, R., 13, and 14th, R., 9), the jury having found (Finding 13th, R., 9), that the said deed by Donovan to Lantz was

"a fraud upon the power held by said Donovan, and was given by Donovan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such facts, and procured such conveyance to be made with such knowledge and design;"

there having been, as shown by the findings and evidence, only a "purported" or "expressed," and no actual consideration, which purported or expressed consideration represented only about one per cent. of the then value of the property.

The argument on the question whether the Donovan deed was effectual to pass a legal title logically divides itself, on this record, into two parts. The first is, *What was the character and scope of the Donovan power of attorney?*

Scope of the Donovan Power of Attorney.

The findings relating to this point are the 2d, 3d and 4th (R., 8). We insist that taking these findings together it appears that the power of attorney expressed on its face or in terms that it was made "to enable the attorney to make conveyances to purchasers when sales were made by Scott, Boyd and LaMaster, and to facilitate their operations under their contract of March 31, 1874."

This is the plain language of the jury. If the power was not as a fact thus limited, but was, as contended by plaintiff in error, a general power, then he should have introduced evidence and procured a finding of the jury to that effect. We shall show that even a *general* power, such as plaintiff in error claims the Donovan power was, would not help his case any. But, if we concede that it would help his case, still the burden was on him to make out his title, and, as a necessary part of his title, to make out a *general* power to Donovan. This results from the well-known rule of law that any one who claims title under the act of an alleged agent, must show all the facts (those *in pais* if necessary) that are essential to the existence of the agent's authority (*Williams vs. Peyton's Lessee*, 4 Wheat., 77). But there is no finding, that the power was general, or was other than the plain language of the jury above quoted imports.

It is true, and is admitted in the opposing brief, that there is no finding by the jury that the Donovan deed to Lantz was made to carry out or effectuate any sale of this property which had been made by Scott, Boyd and LaMaster. The findings of fact num-

bered 29, 30, 14, 13, 37, 40 and 16, above quoted, fairly show, in point of fact (even if this burden were upon us which it is not), that the conveyance by Donovan to Lantz and the simultaneous conveyance by Lantz to Little, were not made to carry out and consummate a sale by Scott, Boyd and LaMaster, but were made by and in pursuance of a conspiracy between Donovan, Lantz and Little, concocted by the latter, through this power of attorney, to defraud the plaintiff of her land. If the power of attorney was by its terms or true meaning and intent limited to the making of conveyances to purchasers when sales were made by Scott, Boyd and LaMaster, then, inasmuch, first, as it does not appear in this record that the deed by Donovan was made for any such purpose, and inasmuch, second, as it does clearly appear that it was not made for any such purpose, but for a fraudulent purpose, and, therefore, was *ultra vires* and beyond the terms and scope of the power, the legal result is clear and incontestable, namely, that it conveyed no title.

The first question, therefore, to discuss is, what, under the findings, was the scope and character of the power? We contend that it was limited, as above suggested. The other side, however, contends that on the findings the power was not limited, but general, and that only the purpose was limited, but that such limitation was not expressed in the power. If we are right in our contention in this respect, this is the end of the case for the plaintiff in error.

The second branch of the discussion under this head arises on our contention that, even if the plaintiff in error were correct, the power of attorney on the

findings must be taken to have been general, authorizing the attorney to make sales and conveyances generally, nevertheless, inasmuch as it is expressly found by the jury that the power was not executed in good faith, but fraudulently, no real and *bona fide* sale was made ; that the Donovan deed was not the deed of the principal, and was ineffectual to convey any title whatever at law or in equity—the distinction in this regard being between a deed executed through fraud directly practiced upon a party holding the legal title (in which case the title would pass at law) and a deed executed by an attorney, without title or interest, under a naked power, for the purpose of perpetrating a fraud upon his principal, participated in by the grantee, in which case the instrument is void, because not within the terms or purpose of the power.

In other words, under the 4th finding of fact, the power of the attorney to make a conveyance depends upon the express condition precedent or limitation that such conveyance is made to carry out and consummate a sale made by Scott, Boyd and LaMaster. But if no such condition precedent or limitation was expressed in the letter of attorney, the power of the attorney is nevertheless subject to the implied condition precedent that the power shall be exercised *bona fide* upon sales actually made in good faith and for value. The facts found negative compliance by Donovan in making the deed with either the express or the implied condition. These two parts of the case we now proceed to discuss in their order, and,

First, we maintain that upon the findings the power of attorney was limited in its character and scope to the making of con-

veyances under sales which had been made by Scott, Boyd and LaMaster, and it appearing that the Donovan deed was not executed to effectuate and carry out any such sale, no title passed.

OUR FIRST POSITION, in reply to the defense based on the Donovan deed, is not based upon the fact that the conveyance was fraudulent because made in prosecution of a purpose to defraud the parties out of this land, nor that the conveyance was void because of the grossly inadequate consideration, or want of consideration, on which it was made, (subjects hereafter considered as to the validity and force of the Donovan deed) but that the Donovan deed is void because executed *ultra vires;* that, being beyond the limited power given to the attorney in fact, it conveyed no title at law or in equity, and hence, as an attack upon the established title of Rowena, it is valueless and ineffectual.

In support of this proposition, it is indispensable to notice the character of the power of Donovan, as that is fixed conclusively by the jury's finding number four (R., 8), which is in these words:

"On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donovan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and Lamaster, and to facilitate their operations under the contract of the 31st of March, 1874."

Concerning this fourth finding, and all other findings, in the special verdict, it is proper in this connection, carefully to observe:

(*a*) That this Court is confined strictly to the

findings of fact as they are established, in determining whether the judgment rendered upon them involves error.

(*b*) That if it would have been more regular for the jury to have found the paper itself which constituted Donovan's power of attorney, than to find, as they have done, what the power was in their own language, then that irregularity is waived, and is not here available to the plaintiff in error, because he accepted the verdict as rendered, and this finding number four is the letter of Donovan's power of attorney as it must be regarded and dealt with by this Court.

(*c*) The scope of that power, then, as fixed by special finding number four, is not that Donovan had power to make sales, not that he had power generally to make conveyances, but that his power was limited to making conveyances as distinguished from making sales, and was limited, moreover, to the making of no other conveyances than to purchasers when sales were made by Scott, Boyd and LaMaster; this power being given according to this finding four, in order "to facilitate their "(Scott, Boyd and LaMaster's) operations under "the contract of March 31, 1874."

Such being the character of this power, what is the rule of law as to the interpretation of such a power, and what, under such rules of interpretation, will be the effect of the words "to make conveyances "to purchasers when sales were made by Scott, Boyd "and LaMaster," in regard to the matter as to whether said power of attorney permitted Donovan to make con-

veyances where no sale had been previously made by Scott, Boyd and LaMaster.

The answer to this question, under the rule of interpretation, as to these words in effect prohibiting conance by Donovan where no sale had been previously made by the three parties named, is easy and conclusive.

In the case of Williams *et al.* vs. Peyton's Lessee, 4 Wheaton, 77, the alleged conveyance was by a Marshal's deed under an alleged tax sale. The power was (like the Donovan power in the present case) a naked power to convey upon certain conditions precedent. The Court (MARSHALL, C. J.) held what is expressed in the syllabus in these words :

" In the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of the power should precede it.

" The party who sets up a title must furnish the evidence to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend."

In the body of the opinion by the Chief-Justice on this point (at p. 79) he says :

" It is a naked power not coupled with an interest; and in all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise, and that the agent must pursue the power or his act will not be sustained by it. This general proposition has not been controverted."

This case has been by this Court repeatedly followed, as, for example, in Taylor vs. Benham, 5 Howard, 233–272, where the question of *ultra vires* arose on the powers of executors created by will; and the

Court on this point uses the following language in the opinion (p. 272):

" Nor is it only a naked power not coupled with any trust or interest, where such strictness is also requisite (Williams *et al.* vs. Peyton's Lessee, 4 Wheat., 79; 10 Pet., 161, and other cases cited). But it is merely a case to show such a sale as may make, in a court of equity, an agent or trustee liable to those for whom he acts."

So, in the opinion by THOMSON, J., in Ventress *et al.*, Executors, vs. Smith, 10 Pet., 161, on page 175, the Court says:

" Authority given to executors and administrators to sell is a personal trust, and must be strictly pursued, and if they transcend their authority in any essential particular, their act is void (4 Johnson's Ch., 368, &c.)."

So in Ransom vs. Williams, 2 Wallace, 313–19, where the opinion is by SWAYNE, J., this question came up under a statute of Illinois, which authorizes execution to issue against the lands of the deceased debtor, PROVIDED that the plaintiff in execution shall give notice to the executor or administrator, if there be any, of the decedent, &c. The Court held that a sale under this statute without such notice was void, and that on a question of title under this statute the burden of proving his purchase to have been after due notice rests with the purchaser. The Court (at p. 319) uses, touching this point, these words:

" The rule on this subject is thus laid down by Chief-Justice MARSHALL: 'It is a general principle that 'the party who sets up a title must furnish the evi- 'dence necessary to support it. If the validity of a 'deed depends upon an act *in pais*, the party claiming 'under that deed is as much bound to prove the per- 'formance of the act as he would be bound to prove 'any matter of record on which its validity might de-

'pend. It forms a part of his title; it is a link in the 'chain which is essential to its continuity, and which it 'is incumbent on him to preserve.'"

In the case of Speigle *et al.* vs. Meredith, 4 Bissell, 120, decided 1868, in the Circuit Court for the District of Indiana (opinion by McDonald, J.), this question came up in a case where the objection was to a deed made in alleged pursuance of a certain trust instrument or power. On page 122 the Court states the way in which the question was presented thus:

"Whether this demurrer ought to be sustained, is the question to be decided.

"(1). In support of the demurrer, it is objected that, on the face of the bill, the conveyance of the one hundred and sixty acre tract of land is void. This objection is founded in the provision in the trust deed, already noticed, that the trustee could only convey the land when the Railroad Company wished to 'sell' it; that the power to convey was a naked power dependent on that precedent condition; that such a power must be literally followed and strictly construed; that the condition must be interpreted to mean a sale for cash in hand; and that the transaction stated in the bill was not a *sale* for cash, but a mere barter or exchange. There can be no doubt that a naked power or trust must be literally followed and strictly construed."

The Court then proceeds to find that the power was in that particular case shown by the bill to have been strictly pursued. The Court here cites on this rule of strict construction, Hill on Trustees, 478; Williams vs. Peyton's Lessee, 4 Wheaton, 77.

So in the case of Morrill vs. Cone, 22 Howard, 82, this Court says:

"The authority conferred upon the mandatary by the title of attorney is special and limited, and his acts under it are valid only as they come within its scope and operation.

"These propositions are not disputed as between the parties to the original contract, but is claimed that *bona fide* purchasers are entitled to repose. This argumen rests on the hypothesis that the delinquency of the mandatory is a breach of an equitable trust, a trust cognizable in a Court of Chancery only. But the assumption is not tenable. The *attorney was not vested with the legal estate.* He was the minister, the servant of his constituent, and his authority to convey the legal estate did not arise except upon a valid sale in accordance with the requirements of the power. * * * It is competent to his principal to show that the transactions was, *in appearance only and not in fact*, within the authority conferred."

In the case of Lessee of Clark vs. Courtney, 5 Peters, 347, the same doctrine is distinctly laid down. The power of attorney was to "sell," "dispose of," "contract," and "bargain for all of said tract." And the attorney under a statute of that state relinquished it to the State for taxes. The Court says:

"*The language here used is precisely that which would be used in cases of intended sales for a valuable consideration in the ordinary course of business,*" "*a relinquishment to the State is not a sale.*" (p. 349) "It seems to us that the ~~value~~ nature of such a relinquishment, amounting as it does to a surrender of title without any valuable consideration ought not to be inferred from any words however general, much less from words so appropriate to cases of mere private sales as those in the letter of attorney."

So we say in this case this iniquitous proceeding violating in letter and in spirit the power given, ought not to be construed to be within a power "to make conveyances to purchasers."

It is necessary, if the defendant wishes to support his title upon this power, to show that Little was a purchaser from Jane Y. Irwin or from some one authorized

to sell, as Scott, Boyd, and Lamaster were, but this is distinctly negatived.

The power of Donovan, as found by the jury, was to make conveyances to purchasers under Scott, Boyd and LaMaster (Record, p. 8, finding 4th). He had no power to bargain and sell, only a naked power to convey, when a sale had been made.

Plaintiff in error contends, opposing brief, pp. 35 and 36, that, there being a power to convey, and a conveyance made, every presumption will be made to uphold that conveyance. This is only to say that on the production of the deed the burden of proof then falls on the defendant in error to impeach the deed. If this, for the purpose of argument, be momentarily conceded, it will be seen, by reference to the 4th, 13th and 14th findings *supra*, that the burden was triumphantly borne. That is to say, the proofs were made and findings returned by the jury which fully impeached the deed.

But this contention of the plaintiff in error is not sound. It is *his* alleged title, and was pleaded as an affirmative defense ; and, therefore, the burden was on him to prove all the facts upon which his title depends, including the happening of the condition precedent to the exercise of the power—namely, a sale by Scott, Boyd and LaMaster. To defeat the title found in the plaintiff below the plaintiff in error must show that he derived title through this Donovan deed, and under the power. If that power was sufficient by its terms to authorize Donovan to convey to any one generally, or at discretion, or to sell and convey, the burden was on plaintiff in error who made claim of title under that power to show that fact ; which he failed to do. There is no finding to that effect in the record, nor any find-

ing which gives any support to the theory of the plaintiff in error on this point.

It is contended in the opposing brief, page 35, that the 4th and 28th findings, R., 8 and 12, show the purpose and not the form, limitation and definition of the power. This is a pure assumption of fact outside the record. The findings of the jury, by failure to move to set them aside and by moving for judgment on the verdict, are accepted. They can be accepted as findings of fact only. Without that what evidence is there that there was any power at all, or of its nature or its extent? Without the power the deed by Donovan, and the title claim under it must fail. Yet they ask the Court to assume, *dehors* the record, a power to Donovan of the nature they claim it to be and not what the jury found it to be, viz., they ask the Court to assume that it was a power to Donovan to convey generally and at discretion, a power, practically to donate the property to whomsoever he would. They must admit the jury have found that the act of Donovan was opposed to the purpose of the power; that it was an atrocious fraud and violation of the trust and confidence reposed; that every finding made by the jury on this head precludes the theory they advance, and precludes the possibility of any *bona fides* in any one in this chain of claim of title from Donovan to DePutron, inclusive. Yet they ask the Court to go out of the record to support the fraud by assuming that the power of attorney gave more power than the jury have found, and more than it was intended to give.

We maintain, on the contrary, that the contention of plaintiff in error on this point is equally at variance with the facts found, as it was shown to be on the former

point. Upon this point the jury expressly found that the power to Donovan was "To enable him to make "conveyances to purchasers from Scott, Boyd and La "Master, and to facilitate their operations under their contract of March 31st, 1874" (4th Finding, R., 8). Also that this deed was given by Donovan and received by Lantz with the intention of defrauding Jane Y. Irwin (13th Finding, R., 9). And further that Samuel W. Little had full knowledge of such facts and procured such conveyance to be made with such knowledge and design (13th Finding, R., 9). That the deeds from Donovan to Lantz and from Lantz to Little were executed at the same time, and were parts of one transaction (14th Finding, R., 9). Here are four things found expressly: 1st. That the Little and the Lantz deeds are one, the intermediary Lantz being merely colorable to conceal the fraud. 2d. That Little was the procuring party, knew and in fact devised the fraud. 3d. That the purpose intended by the parties was fraudulent, and the deed fraudulent in fact. 4th. That it was a fraud upon the power itself; that is to say, it was foreign to the power defined and granted.

The finding that it was a fraud upon the power can have but one meaning. The power is "the authority given." That is the meaning of the word. Power is the "authority to act" (Bouvier's Law Dic.). "A "power is the authority enabling one person to dis- "pose of the interest which is vested in another" (Goodill vs. Brigham, 1 Bosq. & Puller, 197). "A power "is the authority by which one person enables another "to do some act for him" (2 Lilly Abridg., 339). "A "power is the right or authority to do something"

(MARSHALL, C. J., 8 Wheat., 203). The fraud upon the power is fraud upon the authority of Donovan.

The fraud in fact, the conspiracy between Donovan, Lantz and Little, was covered by the last paragraph of the 13th finding. That it was not within the authority, that it was a fraud upon the power, is covered by the other paragraph in express terms. It was, say the jury, a fraud upon the power held by Donovan, and was taken fraudulently and with intent to defraud.

We submit that the cases now referred to (and the number might be indefinitely increased) rule the present case, so far as the plaintiff in error rests his case on the Donovan deed. We here close our discussion of the proposition that the conveyance by Donavan to Lantz was in violation of the express conditions of the power, and hence void.

But we further maintain that, even if the power to Donovan was general in its terms authorizing sales and conveyances generally and was as broad in its scope as the plaintiff in error contends that on the findings it should be construed to be, nevertheless, it was subject to the implied condition in law that the power thereby given should be exercised by the attorney bona fide, and the finding being that it was exercised fraudulently, which said fraud the beneficial grantee procured and in which he participated, the conveyance is equally void in law as if it had been made in violation of an express condition or limitation in the power.

On the general subject of the inclination of the courts in dealing with such fraudulent transactions, to construe powers and other instruments which may come into view, strictly against the consummation of such frauds, the recent case in this Court of Graffen *et al.* vs. Burgess, 117 U. S., 180, where the opinion is by Justice BRADLEY, is instructive.

In some of its aspects this case is quite like the one at bar. It is like it in the totally inadequate consideration which was paid by the fraudulent purchaser for the land. It is like it in this, that the victim of the fraud was, as in the present case, a woman, unskilled in business, and unused to the stratagems which are sometimes resorted to by unscrupulous persons. It is like it in the endeavor to shield the fraud by resort to judicial sales and adherence to forms of law. It is like it in that the fraud, in the present case, is within the description of the fraud in the case then at bar, and which the Court very justly denominates "most atrocious."

CASES SHOWING THAT A FRAUDULENT CONVEYANCE BY AN ATTORNEY IN FACT IS VOID AS TO THE FRAUDULENT GRANTEE.

We now refer the Court to some cases distinctly adjudging that where a power of attorney shows that it was given for the purpose of enabling parties to make sales of property, there a fraudulent conveyance of property by the attorney upon a grossly inadequate or upon a nominal consideration *will not pass the legal title to the fraudulent or collusive or voluntary grantee under such a power.*

It is not the law that equity must be resorted to after an attempted conveyance in fraud of his power by an attorney in fact. It is an elementary principle of the law of agency, that to bind the principal the contract must be within the anthority committed to the agent. If authority be conferred on the agent to sell and convey real estate, it imports that the conveyance must be for a fair and valuable consideration. He has no power to give away the property, or to convey it for a mere nominal consideration, as in this instance, for less than one per cent. of its value.

The question now under discussion—upon examination it will be seen the precise question now under discussion—arose in California in the case of *Dupont vs. Wertheman*, 10 Cal., 354, 1858. Dupont, the plaintiff, being the owner in fee of certain premises, executed a power of attorney to one Price authorizing him "to sell and convey" the same. Under this power of attorney, and in Dupont's name, Price executed a deed of the property to one "Van Nostrand, which is in the usual form of conveyances, purporting to be in consideration of the sum of $8,000, paid at or before its sealing and delivery." In an action of ejectment against an alleged subsequent purchaser under Van Nostrand it was shown *aliunde* the deed executed by Price to Van Nostrand, that there was in fact no sale made by Price to Van Nostrand, and no consideration paid, or agreed to be paid, by him. It was held that under these circumstances the conveyance made by the attorney (Price) in the name of his principal (Dupont) was an absolute nullity. The opinion of FIELD, Justice, is as

satisfactory in its reasoning as it is clear and forcible in its expression. He says:

"The power of attorney from the plaintiff (Dupont) to Price authorized a sale of the premises. It did not authorize a gift of the property, or its transfer for any purpose except in completion of a sale. No consideration was paid, or stipulated to be paid (although $8,000 was recited in the deed). Both Price and Van Nostrand agree in this respect in their testimony. * * * It is immaterial for what purpose the deed was given, as it was not executed upon a sale. The power was special (it was a power "to sell and convey"), and the deed not being in pursuance of the power, could not pass any title from the plaintiff to Van Nostrand. * * * As between the plaintiff and Van Nostrand, the conveyance had no more effect than if it had recited on its face that Price was only authorized to sell the property; but, for reasons best known to himself, made the conveyance without a sale. No parade of authorities could give to such an instrument any operative force in favor of a subsequent purchaser. The same facts existing, though not apparent on the face of the deed, the same result must follow as between the parties. As between them, it was a nullity. In appearance it conferred title, while, in fact, no title passed."

The judgment below in favor of the defendant was reversed, and Dupont held entitled to recover in ejectment, notwithstanding the deed executed in his name by Price, his attorney.

On the same principle that a deed may be defeated at law by parol evidence showing that it was a forgery, or that it was procured by duress, or that it had never been delivered; so it may be likewise shown that it was executed by the attorney not in the exercise of the power given by the letter of attorney, but as a result of a combination between him and the fraudulent grantee under the power to defraud the principal of the property. That the Donovan deed to Lantz was thus exe-

cuted in fraud, and that the beneficial grantee Little (Lantz was only a conduit pipe) procured the deed thus to be made are facts found by the jury upon evidence to the admission of which the record does not show that any objection was taken.

The following case, decided by the Supreme Court of Massachusetts (Chief-Justice SHAW) is also directly in point.

Fay vs. Winchester, 4 Metc. (Mass.), 513, was an action at law—writ of entry—for the recovery of real estate. Demandants were the heirs at law of one Alpheus Fay. In 1823 said Fay made his will, in which he devised and bequeathed all his real and personal estate to Fitch Winchester, the tenant. In 1824 said Fay gave Fitch Winchester, the defendant, a power of attorney authorizing him to sell, lease or exchange any of his (Fay's) real estate. This power remained in force until the decease of said Fay, and was sufficient to authorize the sale of any real estate acquired by said Fay after the making of his will, as above stated. But the will was not sufficient to pass to the devisee any real estate acquired after the will was made. Fitch Winchester, knowing these facts, and acting as attorney for said Fay, made a pretended sale of certain after-acquired real estate to Jacob B. Winchester, his father, and, as attorney for said Fay, executed deeds purporting to convey the same to said Jacob. This pretended sale and conveyance was made by Fitch Winchester in order to prevent this after-acquired real estate from descending to the heirs of said Fay, the demandants in the writ of entry, and in order that

Fitch Winchester himself might indirectly and fraudulently acquire the property. The only consideration was the giving of certain notes by said Jacob B. Winchester to said Fay, payable on demand. After Fay's death Fitch Winchester gave up these notes to Jacob B. Winchester, and Jacob B. Winchester executed deeds purporting to convey the said after-acquired real estate to Fitch Winchester.

The Court held that no title passed to Jacob B. Winchester by this pretended sale and conveyance, which was made under the power from Fay to Fitch Winchester, and hence that the heirs of said Fay were entitled to recover the real estate in an action at law against said Fitch Winchester, the grantee of said Jacob B. Winchester.

Chief-Justice SHAW, giving the opinion, said (p. 516):

"This transaction, upon the face of it, bears strong marks of being colorable and pretended, and not a real and actual sale. Perhaps if it stood thus it would be proper to submit this evidence to a jury, with instructions that if it were colorable and pretended, and not intended as a real sale to J. B. Winchester; if the purpose was to defeat the legal operation of the will of the testator and the law of descent, and merely put the property in a situation to appear to pass as personal property, under the operation of the will, and prevent its going by descent to the heirs, *it was an unwarrantable use and an abuse of the power, and fraudulent; and as against the heirs, nothing passed by the deeds to J. B. Winchester.* But as the case stands, it is expressly found that the intent of this conveyance under the power was 'to secure said estates to said Fitch Winchester, and to prevent their descent to the heirs of said Alpheus Fay, and because the said Fitch Winchester knew that said estates would not pass to him under said will.' This was testified to by the grantee, and therefore this purpose must have been known to him."

"We think the only legitimate and proper use which

Fitch Winchester could make of the power was to execute it for the use and benefit of the testator. It was a naked power only, unconnected with any interest in the attorney himself. To use it for his own purposes, and to defeat the will of the testator and the law of descent, with a view to make the will operate upon property for his own benefit, upon which, by the force of law and the act of the testator, it would not operate, was a *fraudulent use of it, and the estate did not pass by it.*"

That this judgment is fully in point in the case at bar is manifest and undeniable. That it lays down a sound principle of law is, we think, equally clear and indisputable.

So, also, the following case in the New York Court of Appeals.

Easton vs. Clark, 35 N. Y., 225, was an action at law for the conversion of certain lumber. The defendant claimed title under an alleged sale to him by an agent of plaintiff, the consideration for which was: the cancellation of a certain personal debt due from the agent to the defendant (the purchaser); the assumption by defendant of other debts of the agent; and a check to the order of the agent which, as the defendant knew at the time, was to be used by the agent to pay another of his personal debts. The Court held that no title passed to the defendant by the alleged sale.

WRIGHT, J., giving the opinion of the Court of Appeals, said (pp. 232, 233):

" He could not bind his principal by a disposition of the property in any other way than by a sale in the usual course of trade (Story on Agency, § 60). He was not authorized to exchange it in barter or pledge it, because there is no usage of trade to that extent; nor could he transfer it by way of security for his own private debt (Story on Agency, §§ 92, 113). It is well settled that, when the transfer of property is made in a

mode which is not within the scope of the authority confided to an agent, or with which the agent is not apparently clothed, or held out to the public to be clothed, no title to the property passes, and it may be reclaimed by the owner. The purchaser is bound to take notice whether the agent is departing from the usage of trade. He is presumed to understand the restrictions and limitations imposed by the usage of trade upon a general agency (Story on Agency, §§ 224, 225); and when, in making the sale, the agent has departed therefrom, the principal may repudiate the act."

* * * * * *

"A purchaser from an agent intrusted with property for the purpose of sale, with knowledge of such agency, and that the agent is selling to raise money for his own purpose, and intending to apply it to his own uses, *acquires no title as against the principal.*"

So, also, the following case decided by this Court:

In *Clarke's Lessee vs. Courtney*, 5 Pet., 319, the power of attorney was (p. 347):

"To sell, *dispose of*, contract and bargain for all or so much of said tract of land, &c., and *to such person or persons, and at such time or times, as he*" *(the attorney)* "*shall think proper*, and in our or one of our names to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same, as he shall think proper."

The action was ejectment. The plaintiffs' evidence in that case, as in the present one, showed *prima facie* title in plaintiffs. The defendants in that case, as a part of his alleged claim of title, introduced a certain instrument of relinquishment to the Commonwealth of Kentucky, which instrument referred to and purported to be executed under the above power of attorney. The Court below instructed the jury that "the said relinquishment, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land de-

scribed in said relinquishment." The jury found for the defendants; the plaintiffs brought the case on writ of error to this Court; and the judgment below was reversed.

Mr. Justice STORY, in giving the opinion, after showing that the plaintiffs, who were the owners of the land and the authors of the power, received no valuable consideration for the relinquishment to the State, said (p. 349):

"In point of fact, then, the relinquishment gives them nothing as a compensation for the land; but restores back again only the money (if any) which they have paid. Can such a relinquishment, for the purposes contemplated by the statute, be in any just sense deemed a sale? We think not. It is a mere abandonment of the title; or, in the language of the act, a relinquishment or disclaimer. The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons, for a valuable consideration. * * * The State does not buy, nor does the party sell in such a case. *It seems to us that the nature of such a relinquishment, amounting, as it does, to a surrender of title without any valuable consideration, ought not to be inferred from any words, however general*, much less from words so appropriate to cases of mere private sales as those in the present letter of attorney. The question whether such a relinquishment should be made or not is so emphatically a matter of pure discretion in the owner, in the nature of a donation, that it ought not to be presumed to be delegated to another without the most explicit words for, and appropriate to such a purpose. We think that the words of the present letter of attorney are not sufficient to clothe the agent with such authority."

Stainer vs. Tysen, 3 Hill (N. Y.), 279, was an action of assumpsit on a promissory note by plaintiff as indorsee against David J. Tysen as maker of the note. The note purported on its face to have been made by the defendant David I. Tysen by George W. Tysen,

his attorney. The power authorized the attorney, "*To draw and to endorse checks, notes and bills of exchange in my name.*"

The note in question was given to the plaintiff by George W. Tysen, the attorney, for a debt due from the insolvent firm of George W. Tysen & Co., of which George W. Tysen was a member, but with which the defendant David I. Tysen was not in any way connected. The note was without consideration, so far as the defendant was concerned. The Court held that the attorney had no authority to make the note and, therefore, the principal was not liable.

In giving the opinion COWEN, J., said (p. 281):

"There is no doubt that a power drawn up nakedly to do acts for and in the name of the principal, negatives all idea of interest in the agent or authority to act for the benefit of any one beside the principal. This limitation, therefore, the plaintiff was bound to notice. It is an intrinsic fact, and when he is, moreover, told that the attorney, as between himself and principal, is abusing his trust, the reason for making the act conclusive entirely ceases. The plaintiff himself then becomes a party to the fraud."

The Supreme Court of Wisconsin decided a case like *Dupont vs. Wertheman, supra* (and like the present case), the same way.

In Meade vs. Brothers, 28 Wis., 692, COLE, Justice, says:

"The written power authorizes the agent to sell and convey the real estate named, entire or in parcels, to such persons and for such sums of money as might, to the attorney, seem most to the advantage and profit of the constituent. Evidently this contemplated a sale for a valuable consideration, and it never could have been intended to authorize the agent to sell and trans-

fer the title for a mere nominal consideration. * * * It is a cardinal principle that if the act of the agent varies substantially from the authority or commission, in its nature, extent or degree, it is void as to the principal and does not bind him (Story on Agency, Sec. 155). * * * The deed, therefore, not being executed in pursuance of the power conferred upon the agent, *conveyed no title, and, in fact, was void as to the plaintiff.* Its existence presented no obstacle to the plaintiff's recovery."

The case was in ejectment, and the conveyance was set up as a defense to the action.

See also:

Wiltshire vs. Sims, 1 Campbell, 258.
Attwood vs. Munning, 7 B. & C., 278.
Reese vs. Medlach, 27 Tex., 124.

In Morrill vs. Cone, 22 How., 82, above cited, this Court recognized the remedy at law as a proper one in such case, but the plaintiff was not allowed a recovery, because he had suffered the matter to rest thirty-four years, and the premises, as the Court say, "had repeatedly been sold during this long period." In that case all that prevented the recovery was the equity of *bona fide* purchasers. In this case, there are no *bona fide* purchasers or innocent parties to be protected, as the jury affirmatively find, and the existence of the Donovan deed is no bar to her recovery.

There is no pretense of *bona fide* purchaser. The findings are not only silent in respect to the plaintiff's grantor having received or of Lantz or Little having paid the $1,000 recited to have been given in the Donovan deed in this transaction between the conspirators Little, Lantz and Donovan, but the plaintiff in error, in his bill of exceptions upon the question of jurisdiction, has preserved and made a part of the record the affirm-

ative evidence that the matter was not a purchase. In the evidence of Donovan, taken in the cause on its merits and used on the subsequent issue upon the jurisdiction, he says (R., 74):

"I was convinced that Irwin's title to the property "was null and void, and that they had no title, but to "gratify Mr. Little and others I made a deed under "that power to forever quiet titles."

It makes one's blood tingle to read this cool, brazen statement of his fraud. He concluded that his principal had "no title," and "to gratify" adverse claimants he conveys his principal's title *for nothing*.

Also in the same manner is preserved and made a part of the record the fact that Mrs. Irwin, the holder of the legal title to the whole 120 acres, got none of the $1,000 recited by the Donovan deed to have been paid. At R., 72, Int. 15, she is asked:

"State whether he [Donovan] ever remitted to you for the proceeds of any sales of any part of the property he is claimed to have made? A. He never did. I had not heard from him for a long time before and never have heard from him since. Int. 14 to John Irwin, R., 76 and 77: "State whether or not he [Donovan] ever remitted any money or property or accounted for the proceeds of pretended sales of any portion of the property? A. He never did, neither money, valuable, or other contribution whatever."

This extraordinary proof that the deed to Lantz was at the instance of Little and as a mere favor to him, and that Mrs. Irwin got no consideration, a small part of the evidence heard by the jury upon the infamous conspiracy between Donovan, Lantz and Little, on which the jury spoke with such emphasis in their findings, is preserved in the

record by the plaintiff in error himself. But without this the plaintiff in error would be in no better position, as the jury by their findings of fraud leave him without any pretense of *bona fides* in the receipt of his deed or the tenure of his claim of title. The jury say there is no proof of any consideration paid (40th finding, R., 14). He appears to be a volunteer under the party who devised the fraud and is also his near kinsman.

So that, instead of the record showing that the $1,000 was ever paid, as stated at p. 34 of opposite brief, or that the same is still retained, as is contended at p. 35, the record entirely fails to show that it ever was paid, and, on the contrary, evidence in the record, preserved by the plaintiff in error for the other purpose, does show affirmatively that the then holder of the legal title never received any portion of it, and if it ever was paid it was merely as a bribe to Donovan for the corrupt and fraudulent purpose of thereby acquiring an apparent title.

The conveyance by Little to his kinsman is not surprising. The only remarkable fact in that transaction is that no attempt is made to create a color of good faith, or apparent consideration, beyond the recital in the deed. The counsel of plaintiff in error, at page 34 of the opposing brief, at the commencement of the argument on this head fail as remarkably to give "the substance" of the 29th finding, as they did to give the "substance" of testimony in the abstract of evidence on the subject of jurisdiction. Counsel drop the important word "purported" from the 29th finding. The jury do not find that Little or Lantz paid, or that Donovan received the recited consideration, but that Donovan

made a deed for that "purported," or recited, consideration of one per cent. of the value of the property attempted to be conveyed, it is nowhere found that any sum was in fact paid.

If there was any other fact capable of proof, or proven and not found upon by the jury, then the remedy of the plaintiff in error was to have moved to set aside the verdict and for a venire *de novo*. Having failed to do that, and to except to the rulings thereon, he must be held to accept the facts found as all the facts capable of proof necessary to the protection of his rights. The Court will not relieve a party who is himself at fault and who has gambled upon the chances of a judgment in his favor by reversing the case for matter of which he has not complained, in order that he may have an opportunity to speculate upon the chances of another trial.

Even if the Donovan power had been general in its terms, there is no estoppel in favor of De Putron; for the deed under the power is expressly found to be fraudulent, and there is no finding and no evidence that De Putron either paid any value or was without notice of the facts that rendered the Donovan deed void; and on the facts found the burden of proof was on De Putron to show that he paid value and was without notice.

It is clear that there could be no estoppel, unless the Donovan power was, on its face, general in its terms. This the jury did not find. On the contrary, they found (Record, p. 8, 4th finding) that the power was

" to enable Donovan to make conveyances to purchasers where sales were made by Scott, Boyd and LaMaster, and to facilitate their operations under their contract of March 31, 1874." But even if it be assumed, for the sake of the argument, that the contention of plaintiff in error that the power was on its face general in terms, still there is no estoppel in favor of De Putron.

Counsel for plaintiff in error labor to show that De Putron had no notice that the alleged conveyance by Donovan was an unauthorized and fraudulent abuse of the power (Plaintiff's Brief, pp. 34, 35). Even if that were the fact, De Putron would not have any title. If Lantz and Little acquired no title, De Putron acquired none by an alleged conveyance from Little. *Nemo dat quod non habet.*

De Putron is not a *bona fide* purchaser for value. If it be conceded, for the sake of argument, that De Putron paid full value, and had no notice, yet he is not a *purchaser*; for he did not and could not acquire the legal title from Little, since Little did not have the legal title himself. The defense of purchaser for value without notice arises *only where the legal title is actually transferred*, which legal title is subject to an equity prior to the equity of the purchaser. In such a case, if the purchaser has paid full value without notice of the prior equity, he will be permitted by a *Court of Equity* to retain his legal title. That is, a court of equity will take no active measures against him. But a court of equity will not assist an alleged purchaser to *acquire* the legal title. To do so would be highly unjust to him who has the legal title and the *prior equity*. The payment of full value without notice merely enables a purchaser to retain, as against the

holder of a prior equity, whatever *legal* advantage he may already have, for example, the *legal title.*

But in a court of law, the defense of purchaser for value without notice has no place, so far as actions to recover real property are concerned. If a person is a purchaser, that is, *has* the legal title, he needs no such defense in a court of law; if he does *not* have the legal title, no such equitable defense will in a court of law avail him.

But there is another principle somewhat analogous to the equitable defense of purchaser for value without notice, on which the defendant in ejectment may sometimes rely, namely, the principle of *estoppel.*

An estoppel in such a case is like an estoppel in any other, in this respect, it assumes that the plaintiff could show facts which would entitle him to recover, but refuses to permit him to show those facts because it would be inequitable to allow him to do so. In ejectment, for example, an estoppel as to plaintiff assumes that the title is in the plaintiff, but refuses for equitable reasons to permit him to prove his title.

No Estoppel in Favor of De Putron.

In order that an estoppel as to title may exist in favor of a person, *he* must show that HE PAID VALUE WITHOUT NOTICE. This follows from the rule of law, that in order to create an estoppel the party in whose favor the estoppel is claimed must show he acted to his injury on the representation of fact as to which he claims the estoppel; and that, if the party who made the representation was allowed to show that it was in fact untrue, the party who acted on it would suffer loss

from having so acted. The very foundation of an estoppel is the injustice of allowing one person *to cause loss* to another person by permitting him to contradict in evidence the representations which he has made, and on the faith of which the other person has acted. If the person would suffer no loss the foundation of an estoppel fails. If a person who supposes he is acquiring a title pays no value, he suffers no loss ; and cannot set up any alleged estoppel against the true owner.

Railroad Co. vs. Dubois, 12 Wall., 47, 64 ;
American Notes to *Doe vs. Oliver* and
Duchess of Kingston's Case, 2 Smith's Leading Cases, 7 Am. Ed. (H. & W.), p. 715 *et seq.*

The principles here stated are well supported and illustrated by the doctrines as to negotiable paper, which have been repeatedly enunciated in the decisions of this Court.

In *Stewart vs. Lansing*, 104 U. S., 505, Chief-Justice WAITE says (p. 509) :

"It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee before he can recover must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough."

It is true that in the absence of any evidence, the presumption is that an indorsee of negotiable paper is a holder for value without notice. But as soon as fraud or illegality in the origin of the paper is shown, the *burden of proof* is shifted to the holder, and he is then bound to show that he paid value. Until he shows this he is in the same position as the original holder who committed the fraud or illegality.

This principle is tersely stated in *Pana vs. Bowler*, 107 U. S., 529, by Mr. Justice Woods (p. 542):

"The exception relied on by the plaintiff in error is well settled, and is this: if, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor, or any party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value" (citing a long list of authorities, *q. v.*).

In *Smith vs. Sac County*, 11 Wall., 139, which was a suit on coupons attached to county bonds, the petition (declaration) averred that

"plaintiff was the owner and holder of them, that he received them in good faith before maturity *and paid value therefor.*"

The answer "denied each and every allegation in plaintiff's petition."

The case was tried by the Court without a jury, and findings of fact were made. Among other facts found were some that showed or tended to show that the bonds were illegally issued. As to whether the plaintiff had paid value for his bonds, there was no finding of fact, nor did the record present any evidence on that point.

The Court gave judgment in favor of the defendant County. *The question on writ of error was whether the burden of proof was on the plaintiff to show that he paid value for the bonds;* and that this Court held that it was.

Mr. Justice Miller, giving the opinion, said (p. 146):

"Treating the bonds and coupons sued on in this case, which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which

commercial usage throws around such paper in the hands of a *bona fide* purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. This principle is asserted in the text books of Chitty, Story, Parsons and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, p. 752."

The dissenting opinion of Mr. Justice CLIFFORD relates only to the point as to whether in that particular case the finding of fraud or illegality was sufficient to cast on the holder of the bonds the burden of showing that he paid value.

If it be taken as true, as the Court (except Mr. Justice CLIFFORD) held, that the findings of fact in *Smith vs. Sac County, supra*, were sufficient to show fraud or illegality in the origin of the bonds, that case is on all fours with the present one, both as to the point in question and as to the manner in which it arose. The petition in *Smith vs. Sac County*, alleged a *bona fide* purchase for value. The answer made a general denial. The question was thus put in issue by the pleadings, if it was necessary to plead it.

IN THE PRESENT CASE, the Answer alleged (Record, p. 2) a *bona fide* purchase for value; the payment of $10,000 consideration; that $10,000 was full value; and that defendant had no notice (not generally but only) of *any defect in the tax deed.*

The Reply (Record, p. 6) made a general denial, and denied specially that defendant ever purchased, or that he ever paid $10,000 or any other sum for the land.

THE JURY FOUND as to the question of payment of value (Record, p. 14, findings 40, 41) that there was "*no proof of any consideration paid by De Putron to Little for such conveyance*," and that the value of the land at the time was not $10,000 as averred by the defendant, but $40,000.

THE JURY ALSO FOUND the facts which showed that no title passed by the Donovan deed, namely (Record, p. 8, 4th finding), that the Donovan power of attorney was executed

"to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31, 1874" (see also 2d finding, Record, p. 8).

Also (13th finding, Record, p. 9):

"The jury find that the conveyance from Jane Y. Irwin and John Irwin by William T. Donovan, Attorney-in-fact, to J. P. Lantz, was a fraud upon the power held by said Donovan, and was given by Donovan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such facts, and procured such conveyance to be made with such knowledge and design."

(14th Finding, Record, p. 9.) That the land conveyed by the Donovan deed was worth $100,000.

(29th Finding, Record, p. 12.) That the "purported" or "expressed" consideration for the Donovan deed was $1,000; while the evidence (though not properly before this Court) showed further, that not even $1,000 or any other sum was in fact paid (Record, p. 72, Int. 15; pp. 76, 77, Int. 14).

The jury thus found the facts which show that no title passed by the Donovan deed to Lantz or Little. The burden of proof was thereupon shifted, so that De

Putron (in order that he might, as an alleged purchaser for value, estop the plaintiff from recovering), had the burden of proof to show that he paid value. Having failed to show that, the plaintiff was not estopped, as against De Putron, as well as against Lantz and Little, to show that no title passed by the Donovan deed.

III.

Defendant has no Title under Tax Deeds or by Adverse Possession.

The third and sole remaining affirmative defense, is a claim of title deraigned under two tax deeds upon tax sales to one Brock, coupled with a claim of ten years adverse possession. Upon this claim of title the findings of the jury are as follows:

17th. (R., 9). That on June 12th, 1871, Brock received of the treasurer a tax deed of the land in controversy and other lands which purported to be upon a sale made for taxes of the year 1867, but the 5th finding is that there was no assessment of taxes against the land for the year 1867, and the 6th finding is that the deed was not under the seal of the treasurer.

The 18th finding (R. 10) is that on December 15th, 1871, Brock received of the treasurer a tax deed on the property in controversy and other real estate for tax of the year 1868, but item 7 of the verdict (R., 8), finds that the deed was not under seal of the treasurer.

19th. Finding (R., 10), is that Brock on December 18, 1871, leased the premises to Boggs for the period of two years and item 20th that he again on the 18th of December, 1873, leased to Boggs for the further term of two years.

The various findings on the matter of possession are as follows:

21st. (R., 10). That in the month of December, 1871, the said Charles T. Boggs claiming title under the said lease first aforesaid, entered into the mixed possession of the said premises by assuming control and ownership over the same, and by collecting the rents from squatters and persons then located upon said premises, and sub-leased other portions of said premises, and continued to exercise mixed possession of said premises down to the time he yielded his mixed possession of the same to Samuel W. Little, and that he paid rent to N. C. Brock for the said premises during the terms of the two leases above mentioned.

24th. (R., 11). That on or about the month of May, 1873, Charles T. Boggs sub-leased the north half of the southwest quarter of Sec. 24, Tp. 10, R. 6 east, to one D. A. Gilbert, who, on or about that date, entered upon the mixed possession of the same and erected a ranch for cows, or milk ranch, on the north-west quarter of said quarter section, all the said north half of said southwest quarter being at the time he entered therein wholly vacant and unoccupied lands, and that he continued under said lease in the mixed possession and occupation of the same until on or about the year 1878, when he moved off his cattle ranch and surrendered his mixed possession of the same, at the instance of S. W. Little, having during that period attorned and paid rent to Charles T. Boggs.

35th. (R., 13). That in the year 1873, one Hickman entered upon the northeast quarter of the southwest quarter of section 24., town 10, range 6 east, under a lease from Charles T. Boggs, and erected thereon stables for a milk ranch, and paid rent thereon for said premises at the rate of $12 per annum, and continued to occupy the said premises for such purposes, and for feeding and herding his stock thereon for a period of about two years.

23d. (R., 10). That on the 18th day of May, 1874, said Nelson C. Brock and his wife by their deed of quit-claim, conveyed all the said premises—the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, town 10, range 6 east—to Samuel W. Little, which deed was duly recorded in

the County Clerk's office of Lancaster County, Nebraska, on the 26th day of May, 1874.

22d. (R., 10). That at the expiration of his term under said leases he (Charles T. Boggs), yielded his mixed possession of the said premises to Samuel W. Little.

25th. (R., 11). That in the year 1876, Samuel W. Little began breaking up and actually improving the northeast quarter of said quarter section, and erected wind mills and placed other valuable improvements thereon, planted trees and shrubbery, and set out hedges and other fences, and thence until he delivered his mixed possession of the said property to his several grantees had the mixed possession of the said premises—said northeast quarter of the southwest quarter of Section 24, town 10, range 6 east.

36th. (R., 13) That from May 31st, 1874, continuously down to the time of the commencement of this suit, June 14th, 1884, Charles T. Boggs and Samuel W. Little and his and their lessees and grantees, under claim of title thereto held mixed possession of all the north half of the southwest quarter of section 24, town 10, range 6 east, and no other person entered thereon under claim of title to any part thereof.

11th. (R., 9) That up to the year 1876, the said defendants and their grantors had mixed possession of the land in dispute, to wit: The northeast quarter of the southwest quarter of section 24, township 10, range 6, but said land was open, vacant and unoccupied, except by the city pest house, and was used as a common.

32nd. (R., 13) That Nelson C. Brock and Samuel W. Little and their respective grantees of any property in dispute herein, have paid all taxes assessed against the said property since the entry thereof to the year 1884, under claim of title to said premises.

41 Part 2d. (R., 14) January 29th, 1875, S. W. Little was holding said premises as purchaser at tax sale under certificate of purchase May 26, 1874, for tax of 1872.

38th. (R., 14) That Samuel W. Little delivered to the said John C. Deputron the mixed possession of the said premises at the date of the execution of the said deed, and that the said John C. Deputron thence and hitherto has held the mixed possession of the same.

Reasons why the Tax Deeds are void.

1st. The first tax deed is void for want of a tax levied in that year to support the sale. Both tax deeds are void on their face, for want of the treasurer's seal to these instruments. The entire discussion in the opposing brief, from page 38 to 40 inclusive, is an attempt to obtain in this Court the review and overruling of a long and unvaried and well-settled line of decision of the State Court, upon its revenue law running from 2d to the 25th Nebraska reports inclusive. The best answer to this part of the opposing brief is to quote from the last decision of the Supreme Court of Nebraska, on this question. In Gue vs. Jones, 25th Nebr., 637, the Court (COBB, J.), says:

"The Act of 1861, under which the deed was executed, provides, at Section 60, that such conveyance shall be executed by the treasurer, under his hand and seal. Then follows the statutory form of deed, concluding with the words of attestation, In testimony whereof, said treasurer, of said county, has hereunto set his hand and seal, on the day and year aforesaid. [seal]. The statute has substantially been carried forward throughout all the changes of the revenue law to the present day. Under its provisions it has been held by this Court, in cases too numerous for citation, that a tax deed not executed by the treasurer under his seal of office is void."

This decision, made by the Court at its last term and its latest expression on this subject, ought to be conclusive on the question. To same effect are the following: Sutton vs. Stone, 4 Nebr., 323; Reed vs. Merriam, 15 Nebr., 325; same principle, 15 Nebr., 472; 16 Nebr., 160; 16 Nebr., 195; 16 Nebr., 200; 16 Nebr., 548.

2d. In sales *in invitum* it is necessary that all the steps requisite to the validity of the sale be established by

one claiming under it, to have been taken. There is no presumption available to sustain such deed. Every essential step must be proven by the one who claims under the deed.

Ronkendorff vs. Taylor's Lessee, 4 Pet., 358.

Williams vs. Peyton, 4 Wheat, 79.

3d. As to the claim of ten years possession, with claim of title under these deeds, the jury negative that fact, and find affirmatively that as late as January, 1875, Little was holding as purchaser at tax sale under a certificate of purchase May 26th, 1874, for tax of the year 1872. He was not then asserting ownership under the former irregular tax deeds to Brock as a tax certificate is not color of title in the State of Nebraska.

McKeighan vs. Hopkins, 14 Nebr., 364.

4th. Tax deeds, though void upon their face, and insufficient to convey title, are in Nebraska good color to sustain a claim of ownership by ten years adverse possession. But the claim is not made out. The verdict fails to show the essential elements of title by adverse possession. Title by adverse possession must be shown affirmatively, by proof of possession for the requisite time, open, actual, hostile, exclusive and continuous.

The claim and possession was not sufficiently early in its inception.

The suit was begun June 14th, 1884. In January, 1875, as found by the jury (R., 14, at 41st finding), Little was holding under his certificate which we have shown will not sustain the claim of ownership. The purchase at the tax sale was an admission that some one else was owner. It was inconsistent with ownership. Further-

more, down to some time in the year 1876, when he began to break up the ground and to erect his windmill and to plant trees (see 11th finding, R., 9 and 25th finding, R. 11), the land was vacant, open and unoccupied, except by the city pest house, and was used as a common. To that time the possession was in dispute, and, as the jury say, mixed.

Some portions of the other eighty acres of this 120 acre tract, were in possession of Brock and his grantees, but other portions were in possession of squatters, and some portion in possession of Mrs. Irwin and those claiming under her (12th and 15th findings, R., 9). In this there was nothing exclusive. The jury say it was disputed and mixed. There could therefore be no constructive possession of this land in controversy. There is sometimes a constructive possession of a whole tract where the claimant has an actual possession of a part, *and no one is in possession of the remainder.* But where the possession is mixed, the seisin or possession is in him who has the legal title (Angell on Limitations, 6th Ed., § 410). Constructive possession is a fiction for the protection of the true owner's title to vacant lands and to give him a right of action against trespassers. (Lemoine vs. Dunklin, 38 Fed. Rep., 569.)

To establish a title by adverse possession, the possession must not only be open but actual, hostile and exclusive. Mere possession, unless proven hostile, is presumed to be in accord with and subservient to the true title and legal possession of the owner (Bradstreet vs. Huntington, 5 Pet., 439.)

The possession must be continuous. If there be a re-entry by the owner, or a mere trespasser, or an abandonment by the disseizor, the true owner is re-

stored to his possession. It must be begun and continued in the same right.

Armstrong vs. Morrill, 14 Wall., 120, 146.
Olwine vs. Holman, 23 Penn St., 284.
San Francisco vs. Fulde, 37 Cal., 353.
Lovell vs. Frost, 44 Cal., 475.
Beupland vs. McKeen, 28 Pa. St., 124, 134.
Doswell vs. DelaLanza, 20 How., 32.

If the possession is conflicting or mixed, constructive possession follows the title, or better or older right, as the case may be.

Hunnicut vs. Peyton, 102 U. S., 369.
Hunt vs. Wickliff, 2 Pet., 212.
Barr vs. Gratz, 4 Wheat., 223.

It is also to be observed, that in the draft of the findings, as submitted to the jury by the plaintiff in error, the words were "exclusive, actual, undisputed, open, notorious and adverse," and that these were stricken out by the jury and "mixed" inserted. This appears in the record by the comment and opinion of the Circuit Judge filed in the cause (R., 25). The learned Judge had before him the original verdict of the jury, in its original form, as submitted to them, with the erasures and changes made by them. In other words, though asked to find the possession to have been actual, undisputed, exclusive, open, notorious and adverse, the jury refused so to find and found the possession to have been mixed. So the title by adverse possession was not made out, and the plaintiff in error accepted the verdict and by motion invited the Court to render judgment thereon as on the true facts in respect to the claim of adverse possession.

IV.

The recovery is not too large.

The last point made in the opposing brief is that the recovery is too large. No such fact appears of record. On the contrary, the jury find (finding 37, Record, p. 14), that the specific land described in that finding, repeated in the judgment (p. 26), of the Court, is "the premises in dispute." If the objection now made were true in point of fact then it was incumbent on the defendant to raise this by motion to set aside the verdict and for a trial *de novo* (see *Hawkins vs. Glenn*, 131 U. S., 319, 335. It would then have been in the power of the Court to permit an amendment, or to require plaintiff to file a remittitur. The case will not be reversed for alleged error of this kind, for which, even if it existed, the plaintiff in error is himself responsible in permitting it to pass unchallenged and in moving for a judgment. It is so held in a similar case in this Court in Railroad Co. vs. Linsay, 4 Wall., 656, where such an objection was considered "purely technical." The discussion of the Court in that case is applicable to the case at bar.

2d. But it is a mere assumption, *dehors* the record, that the premises in controversy cannot be seven hundred and fifty feet in width and fourteen hundred feet in length. This assumes that the survey by the government was in fact conformable to the standard and the usual dimensions. If it were so then the land would measure but 660 feet in width. Yet there are errors in survey. Excess of acreage in government subdivisions is a very common matter. The

records and decisions of every Court of last resort attest that fact. It is a fruitful source of litigation. It does not follow that the forty acres does not measure fifteen hundred feet in one extent and fourteen hundred feet in the other. It has happened in one instance that has come to the observation of the writer of this part of the brief, that by the government survey a tier of sections in several townships was two miles in length, an error having been made in the laying out of the townships whereby they were made seven miles long instead of six.

By the 37th finding (R., 14) the jury find Little conveyed to DePutron all *that part of the southeast quarter of the southwest quarter of Section 24, &c., being the premises in dispute described as follows*, giving the metes and bounds of premises fourteen hundred feet in length and seven hundred and fifty feet in width, less the Leighton tract in its southwest corner. When the tracts described in the 37th finding are platted and meandered out the exterior meander line will conform to the meander line in the judgment, so that the judgment exactly conforms to the finding of the jury as to the premises in controversy. Such a circumstantial finding by the jury, accompanied with the distinct statement in that finding that it is "the premises in controversy," ought to be the strongest evidence that there was here no mistake. This is made conclusive by the fact that no such mistake was suggested in the court below.

It cannot, therefore, in face of the fact that the jury find this is the description of the premises in dispute; that the plaintiff in error himself accepted the finding, and now first makes complaint of it; that the Court has

no evidence before it to determine what is the extent of the premises,—upon these facts, it cannot be here assumed that the description is in any respect incorrect, nor can such assumption be ground for the reversal of the judgment.

3d. But if the description in the judgment were incorrect that would not be cause to reverse the judgment. If there is anything in the point, then, inasmuch as the jury in the first finding have distinctly established the plaintiff's title to the land in dispute, and all of it, all that would be required would be to order a judgment in conformity with the pleadings and the first finding. This Court has so decided in a case cited by plaintiff in error (Insurance Co. vs. Boykin, 3 Wall., 439).

CONCLUSION.

It follows therefore that the judgment should be affirmed. Both parties, by their motions for judgment, have accepted it as the ultimate and best obtainable statement of the facts out of which the controversy springs. The verdict was not objected to by motion for a new trial, or in any other mode. Both parties accept it to be as true and clear a settlement of the facts, complicated as they are, as the circumstances of the case, the conflict of evidence and the infirmity of memory permits now to be obtained.

The verdict clearly establishes title in the plaintiff (the defendant in error) unless divested by one of the three adverse claims of title set up. The affirmative title was pleaded and the *onus* to show these adverse titles, or one of them, to be good, is thrown upon the